PRICE SIXPENCE

The Struggle for Native Rights in Rhodesia

Extracts from the Argument of

Mr. LESLIE SCOTT, K.C., M.P.,

before

The Judicial Committee of the Privy Council

April 16 to May 2, 1918

PUBLISHED BY
THE ANTI-SLAVERY AND ABORIGINES PROTECTION SOCIETY,
Denison House, Vauxhall Bridge Road, London, S.W.1.

The Anti-Slavery & Aborigines Protection Society

President :
SIR THOMAS FOWELL VICTOR BUXTON, BART.

Chairman of General Committee :
LORD HENRY CAVENDISH-BENTINCK, M.P.

Vice-Chairman of General Committee :
CHARLES ROBERTS, ESQ., M.P.

Treasurer :
E. WRIGHT BROOKS, ESQ., J.P.

Secretary :
TRAVERS BUXTON, M.A.

Organizing Secretaries :
JOHN H. HARRIS & MRS. HARRIS.

Chairman of Parliamentary Committee :
RIGHT HON. J. W. WILSON, M.P.

Bankers :
BARCLAY'S BANK, LTD.
95 Victoria Street, S.W.1

The Struggle for Native Rights in Rhodesia.

EXTRACTS FROM THE ARGUMENT OF MR. LESLIE SCOTT, K.C., M.P., BEFORE THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, APRIL 16 TO MAY 2, 1918.

Mr. LESLIE SCOTT: Your Lordships may naturally expect when Counsel addresses your Lordships on behalf of the Natives that Counsel should know on behalf of what Natives he does appear. . . . It was actually the 4th August. I was instructed to attend before your Lordships' Board by a Society which has had a very long record of good work in the Native cause, the Anti-Slavery Society.

Earl LOREBURN: Natives who have been helped and are encouraged by a beneficent society.

Mr. LESLIE SCOTT: Precisely.

Lord DUNEDIN: Then your instructions will come from the Society.

Mr. LESLIE SCOTT: For all practical purposes I am instructed by the persons who are acting in that Society.

The first proposition is that tribal ownership in Southern Rhodesia corresponded to the whole of the land as divided up amongst one tribe or another. The land of Rhodesia was, broadly speaking, covered by one occupying and owning tribe or another. My second proposition is that although the notion of individual ownership or it may be of ownership of land at all would not have been understood by any native, yet the relations between a tribe and the land which it occupied can only be described by an English lawyer as one of ownership. Thirdly, that although in the Native land the distinction which we recognize so clearly between the territory of a Sovereign and the property in land of its owner was not known, but the enjoyment by the individual member of the tribe of the rights of occupation which they had from their chief as representing the tribe had all the attributes necessary to connote private ownership as distinguished from public ownership in constitutional law. Those rights of enjoyment by the individual in the tribe enjoyed to a certain extent in common, but also enjoyed individually, those rights are rights of private property for the purpose of rules of law affecting the conquest or cession of territory by one Sovereign Power from another. So that in regard to each tribe, taking the Matabele tribe as an illustration, as a name the Matabele tribe communally owned the whole of Matabeleland proper, that is to say, the territory within which Lobengula exercised full sovereignty, and over which his tribe or sub-tribes enjoyed their rights of occupation. May I add this? This reference to your Lordships' Board

is a reference as to the legal position. I am therefore not going to trespass in any way into the domain of policy. It may be, and I recognize that fully in speaking on behalf of the Native population, that legislation in dealing with Native rights in an African Protectorate is obviously necessary when white settlers come in. So any submission of law I make must not be taken in any sense as touching on the realm of policy.

CONQUEST AND EXPROPRIATION.

Mr. LESLIE SCOTT: If there be any such right in the British Crown as conquest to expropriate without legislation, then it is necessary to show that the Crown, in fact, did it.

Earl LOREBURN: Of course, it is always necessary to show that.

Mr. LESLIE SCOTT: My submission would be here that the fact that the Crown deliberately decided to maintain the status of the Protectorate would be conclusive to show the Crown did not expropriate.

Earl LOREBURN: Do you wish to make any discrimination between what the Crown can do in the way of exercise of the rights of conquest and what it must obtain the sanction of Parliament to do? You can consider that question.

Mr. LESLIE SCOTT: I do not think that question, which is a very important one, will be relevant to my argument. I desire not to express any opinion on that at the moment.

Earl LOREBURN: You have given us the three propositions you intend to argue. Is there any other?

Mr. LESLIE SCOTT: The fourth is, and I use a date in order not to beg the question, that after 1893 the British Crown did not either by Act of State, if that be constitutionally possible, or by legislation, expropriate the Native title.

THE POSITION OF THE NATIVES.

Mr. LESLIE SCOTT: My Lords, the position of the Natives is only indirectly relative to the legal argument, but I want to say a word or two about it. They are not represented on the Legislative Council. They have no representation whatever. There are two Natives who own a piece of land under the white tenure, or something like that; some perfectly trivial and negligible number out of a population of three-quarters of a million Natives. There is a clause, Section 4 of the Regulations, on page 364, of Document D, which contains a specific and express denial of the right of the Natives to register as voters on the basis of this Communal title, quite naturally I understand, but that is the position. Of three-quarters of a million, although some 400,000 to 450,000 are in the reserve areas, 300,000 are left on the unalienated lands and alienated lands together, of which something like half, 100,000 to 150,000, are on the unalienated. The Natives pay nearly one-half the total taxation of the country, £300,000 out of £700,000 odd.

Earl LOREBURN: I am sure you remember what we are doing is considering questions of law; and that is all, and not going into the question of policy or propriety towards Natives in the least. You may be quite sure the Native case as presented by yourself will be attentively considered from the point of view of our jurisdiction.

Mr. LESLIE SCOTT: It is not for me as Counsel for the Natives to

suggest their interests have been altogether neglected. I say nothing of the sort; but I do say the position is one of the gravest public importance, because their rights in land have been totally disregarded. In the year 1912 there was a Committee appointed to inquire into Native affairs by the Government of Southern Rhodesia, and I have had certain extracts from it reprinted from the official document, the Government Report. Will your Lordships turn to page 2, and at the top of the page you will see Section 71: "We see no objection to the present system of allowing Natives to occupy the unalienated land of the Company and pay rent. The occupation is merely a passing phase, the land is being rapidly acquired by settlers with whom the Natives must enter into fresh agreements or leave." That illustrates the official view. That is the land which, in the Native submission to your Lordships, is the property of their tribes.

Earl LOREBURN: That is the strongest of your arguments if you establish it to show there was a tribal right to it.

Mr. LESLIE SCOTT: Precisely. I will hand your Lordship an extract from the South African Report of 1905. It is an extract from the evidence taken before the Commission that inquired into the position of the Natives throughout South Africa. There is a passage on page 1 of the Extracts of Minutes from the evidence of Mr. John Kerr. He was being examined by Sir Godfrey Lagden, who was Governor of Basutoland. At the end of the extract at Question 36,762 there is this: "Have you any other views upon the land question which you would like to express?—I think the Natives are bound in a country like this to be provided with land. I think that is only fair and just to the Natives, seeing that the Chartered Company have really practically confiscated the whole of the lands, and that they are only living on sufferance, and therefore I say it is the bounden duty of the Chartered Company to see that if the Native does not like to go out to the mines, he has somewhere he may call his home."

Lord ATKINSON: The next witness gives some important evidence as to private rights.

Mr. LESLIE SCOTT: Yes, my Lord. I was going to bring that in presently. I could multiply passages of that type indefinitely. They merely point out what the question is in a striking way, and they do not really elucidate it.

Earl LOREBURN: The gravity of the consequences of decision and of subsequent action of the Natives.

Mr. LESLIE SCOTT: Certainly. The effect of that is that at the present moment the Natives have no security of tenure anywhere at all, unless an individual has come to the Chartered Company and said, I want to buy a piece of land from you, and then he will pay his purchase money and his quit rent and have his land like a white man, but unless he does that and buys land which on their contention to-day before your Lordships is already their own land, they have no security of tenure. I say that advisedly, because even in regard to the reserves there is no security of tenure. In 1915, as your Lordships will remember, the Commission was appointed to inquire into the Native Reserve question and deal with it further. That Report has been already referred to before your Lordships, and in that inquiry they take away from the Native Reserves that have been granted in 1894 and 1895 something approaching to one-third or one-half. It is true that additional reserves were given, some 6,000,000 acres were taken away and some 4,000,000 or 5,000,000 acres additional were added. The only point as I made it perfectly clear is that the reserve

lands are not lands in which a full title has been given to the Natives which they can keep for their own, and the real legal relevance of that is touching the question whether there was any land settlement in the question of expropriation or compulsory purchase, the purchase price being other land in 1894 or subsequent years.

Mr. LESLIE SCOTT: Let me put it in one sentence that covers all questions of the kind. There has been no final settlement up to to-day of the question of rights of Natives in the land. That there will have to be further settlements is undoubtedly clear in my submission, if my legal submissions are right, but that there has not been any right such as to divest the Natives of their title is my submission.

Earl LOREBURN: The consequences must be applied whatever they be.

Mr. LESLIE SCOTT: Yes, quite. It is in that fact, if it be a fact, that importance of this reference to the Natives' case lies.

Lord SCOTT DICKSON: There is no dispute about that unless it is Lippert Concession.

Mr. LESLIE SCOTT: That is the position I am respectfully setting up on behalf of the Natives. The argument, stripped of everything that is not most fundamentally essential, is this, that private property of the Natives before 1893 never has been taken.

Earl LOREBURN: That is your real point.

Mr. LESLIE SCOTT: That is what it comes to.

Earl LOREBURN: That is the main proposition of yours.

Mr. LESLIE SCOTT: They may come down to that ultimately. I will remind your Lordships in connection with the question of reserves that the case of the other parties to the reference treat the reserves as within the definition of unalienated land, the status of which is referred to your Lordships for decision. The reserves are expressly included.

NATIVE LAND TENURE.

Mr. LESLIE SCOTT: I was commencing to deal with the Natives' title, and in relation to that pointing out the character of the Native occupation of the land. The Counsel who have preceded me have I think a little left the impression that the Natives of Southern Rhodesia were nomadic hunting tribes. I desire to call attention to the fact that they were mainly agricultural, and although their system of agriculture was one which left lands fallow for a considerable number of years, yet the incidents of agricultural life, more or less permanent tenure of lands cultivated, characterized the Natives of Rhodesia. I gave your Lordships one reference in the Command Paper No. 8,674, relating to the Southern Rhodesia Native Reserves Commission of 1915, copies of which I handed to your Lordships, and I desire to call your Lordships' attention to one or two other references there, merely illustrative, not exhaustive in any way, to show the character of the Native occupation.

Earl LOREBURN: Is this the proposition: that there was not one territory under Lobengula, but there were a variety of different tribes with different territory, so to speak, to which they were attached?

Mr. LESLIE SCOTT: Yes.

Earl LOREBURN: That they were carrying on to a considerable and you say to a predominant extent an agricultural life, and that the system was that they did not individually own property, but that they were occupants according to the direction of their Chief for agricultural purposes.

Mr. LESLIE SCOTT: Yes.

Earl LOREBURN: And that they were not, therefore, as you say, under the domination of Lobengula in so far as the allotment and occupation and so on goes?

Mr. LESLIE SCOTT: Yes, and to those propositions I should like to add an explanatory comment on the last; under Lobengula there were probably certain sub-chiefs, but the whole of his sovereignty, the whole of his Kingdom was limited in extent to something like 60 miles round Buluwayo.

Earl LOREBURN: You must encounter this, that Her Majesty Queen Victoria recognized Lobengula as the sovereign of Mashonaland and Matabeleland. You know quite well that the Courts of Justice take from the State the definition that the State imposes upon the authority or power of foreign princes.

Mr. LESLIE SCOTT: I am not on the question of conquest at the moment; I propose to deal with that separately. I want your Lordships to remember the order I am taking it in: Native title first, then logically comes the Lippert Concession, then the conquest, then the position of the British Crown as the protecting Power; then a consideration of the constitutional effect of an African Protectorate, which is not very clear, and then the legislation by Order in Council from 1894 onwards. Those are the logical steps.

Earl LOREBURN: Quite right; now let us have the references you want to give.

Mr. LESLIE SCOTT: It is page 46 of the 1915 Commission Report. Your Lordships see the second Reserve, the Umtasa South Reserve: "Recommendation:—This Reserve should remain as at present laid down and a small increase be made to its area. It is quite inadequate for the present requirements of the Natives, but it can only be increased by the inclusion of one small area which is described hereafter. There would be strong objection on the part of the Natives to leaving the Reserve, as the land has been in possession of the Umtasa and his ancestors for generations." The next one is the Umtasa North Reserve, and in the sixth line you see it is under a Native Chief:—"His tribe is one of the oldest in Mashonaland and have lived where his kraal now is for many generations." I think that those two illustrations I have given are sufficient for illustrating this point, and to make good *prima facie* my submission.

Earl LOREBURN: Quite right, that is the position at all events about them.

Mr. LESLIE SCOTT: Yes, and of others. I am taking it as illustrative. That is in 1915 and 1916. That defines the proposition; they were Natives that had lived for generations upon the same area of land. There it is clear that the individual Natives, through the communal title, must be treated as having in, say, 1890, practically the complete ownership of the land through the communal title, and it is a matter of indifference from the point of view of constitutional law whether we should as Western lawyers describe it as a title in which the King had the absolute fee as

trustee for his people, or whether it was communally vested in all. The important aspect of it to bear in mind when we consider the question of concession and territory and conquest and so on, is that the enjoyment by the individuals practising their agricultural occupation was of a personal character, and had all the attributes of private property.

Earl LOREBURN: The tribe owned it for all practical purposes.

Mr. LESLIE SCOTT: Precisely, and although they only show in their minds the idea of occupation, that does not matter.

Mr. LESLIE SCOTT (quoting from Report on South African Native Affairs Commission, 1903–1905, paragraph 212): "A characteristic of the Natives of South Africa is their tribal organization. The tribe is a community or collection of Natives forming a political and social organization under the government, control, and leadership of a chief, who is the centre of the national or tribal life. It is through the existence of a chief that the tribe is conscious of its unity. As the father is to the family, so is the chief to the tribe. He is sometimes the chief of a congeries of tribes, and then is known as paramount or supreme chief, or he may be the head of a single tribe composed of a number of families, usually members of the same clan or using the same totem. Each member of the tribe owes him personal allegiance and service, to be performed gratuitously when called upon, in the interests of the chief or the tribe. Each member has the right to maintenance from the land of the tribe. (213) As a father exercises authority within his family, as the headman of a kraal or collection of kraals rules them and exercises authority over them, so the chief rules the tribe and guides its destinies. Furthermore, as the father consults his family, and the headman consults the men in the kraals under him, so a discreet and wise chief consults the elders of his tribe. He is their chief court of appeal, he sanctions all changes made in the traditional usages of the tribe, but everywhere amongst the Natives the absolutism of the chief is tempered by institutions which keep it in check. It cannot be said that the judgments of chiefs were always equitable, but in the generality of cases they were so, and their administration on the whole was acceptable to the people." Then a little lower down on the same page there is this at paragraph 216: "The laws, customs and usages prevailing amongst the Natives previous to the establishment of European government over them have not been abrogated or forbidden, except so far as the same may be repugnant to the general principles of humanity and civilization." Then paragraph 217: "It may fairly be said of the Natives of South Africa that though there are variations of details in the laws of succession and inheritance, and in other customs and usages of the various tribes, there is great similarity in their tribal systems."

Earl LOREBURN: Might I ask with regard to the proposition which is advanced by Mr. Leslie Scott as to the effect of the tribal character of the occupation of the land, and from that we may infer what kind of ownership may or may not arise from it, is there any dispute about that among the learned Counsel?

Mr. LESLIE SCOTT: My Lord, the Legislative Council in this case especially accept possession.

Earl LOREBURN: I asked if there was any question about it amongst the learned Counsel.

Mr. LESLIE SCOTT: I am obliged to your Lordship.

Earl LOREBURN: Very well. If there is a dispute arising about that,

Mr. Scott, you will not be precluded from an opportunity of establishing it. At present the evidence is, and the Counsel do not seem to differ from it, that there were various sections of the community who had a certain kind of communal usage of occupation, I will not define it in any other way, but a communal usage of occupation which resulted in their having rights, and the use and profits of the land. That is all you want to establish. It may be contradicted, and if so you will not be precluded from dealing with it.

NATIVE LAW OF ALIENATION.

Mr. LESLIE SCOTT: My Lords, then the next question is the Native law of the alienation of land. In order that we may consider the Lippert Concession. Before I come to the Lippert Concession and in advance I want to say this:—I do not propose to repeat any of the arguments that have been addressed to your Lordships on behalf of the Legislative Council as to its interpretation, but I have to deal with its validity, the extent to which, if at all, it is valid in matters of area or land affected by it, and there are one or two points of interpretation that have not been referred to at all, and it is those points only to which I wish to refer.

Earl LOREBURN: By all means.

Mr. LESLIE SCOTT (quotes Hermansberg Mission Society v. The Commissioner for Native Affairs, etc., 1906): "In order that the alienation by a Native chief of tribal land shall be binding on the tribe their consent in accordance with Native custom must be clearly proved; a contract validly entered into in that way will bind the chief's successor and his people. Where such alienation by a chief of a Bantu tribe"—and Mashonaland and Matabeleland are both Bantu tribes—"takes place with the unanimous consent of his council of indunas, held that the alienation was binding on the chief's successor and on his tribe." The two chief witnesses as to Native law and custom in relation to land tenure were Mr. Taberer, the Assistant Secretary for Native Affairs, and Mr. Shepstone, from each of whom we have affidavits which my learned friend, Mr. Lawrence, has read to your Lordships. The Court treated their evidence as the evidence of men entitled to great weight.

Earl LOREBURN: The importance of that case seems to be they recognized that by usage the people had a right to protect themselves with regard to the alienation of land against their chief. Therefore it was not his own sweet will.

Mr. LESLIE SCOTT: That is the relevance of the case.

Lord ATKINSON: Apparently the way the consent of the tribe was given was through the indunas.

Mr. LESLIE SCOTT: Precisely, my Lord; and confirmed, it may be by what is called a pitso or meeting of the whole people.

Earl LOREBURN: There is a rudimentary right of some kind.

Mr. LESLIE SCOTT: Yes. The evidence is stated of these two gentlemen, and it appears on page 137. It is only on this question of the Lippert Concession that I read the case: "Mr. Taberer, the Assistant Secretary for Native Affairs, stated that he had much experience of Native customs. Amongst the Bantu races the position of chief with regard to land was that of trustee for his people. If he wished to alienate the land he would have to get permission of his tribe as represented by his councillors. Unless

the council were unanimous the chief would have no power constitutionally to carry out the proposal. The pitso was a Basuto constitution." There is a question here whether pitso was an institution practised and observed by the Matabeles and Mashonas or not, and from our being prevented from getting Native evidence on the point I am not in a position to give your Lordships the information which you ought to have in this case.

Earl LOREBURN: Lord Atkinson has drawn my attention very kindly to the fact which he noted that in the Rudd Concession there is a recital with regard to the indunas' consent, and in the Lippert Concession it is not so.

Lord SUMNER: That is so. There are memoranda attached to the Lippert Concession.

Earl LOREBURN: We must look at it if it is material. Your main proposition does not depend upon the method practically or the way, but upon the fact that there is a right of some kind on the part of the people. That is exactly what you want.

Mr. LESLIE SCOTT: Yes.

Earl LOREBURN: And that is all you want?

Mr. LESLIE SCOTT: Yes, and the only reason I referred to this case was for the one point to make it valid that the consent of all the indunas was necessary. Your Lordships have that in mind. The Judge who tried this case said that he was very much impressed with the evidence of Mr. Taberer and Mr. Shepstone. Will your Lordships on this point kindly look at the Lippert Concession for a moment. That is on page 73 of Appendix A.

Earl LOREBURN: You are going to the Lippert Concession now?

Mr. LESLIE SCOTT: Yes, on this one point of validity. At line 33 on page 74, it says: "There were present at the discussion of the above grant besides the King Lobengula, Umhlaba (the Regent), Umlagela, Gambo, Umjana, Lutuli, all indunas." There were four indunas, and four only.

Earl LOREBURN: That is the statement of Lippert.

Mr. LESLIE SCOTT: That is Mr. Lippert's statement. Mr. Moffat says his principal indunas, and that is all, not that all the indunas were present.

Lord SUMNER: Is the contention like the Polish constitution, that a veto be over every one? I thought you read from the decision of the Transvaal Supreme Court that the unanimous consent of all the indunas present was necessary.

Mr. LESLIE SCOTT: No, my Lord; the unanimous consent of all the indunas.

Lord SUMNER: The absence when alone the dissent of one vitiates the grant.

Mr. LESLIE SCOTT: In Native law, my Lord, yes.

Earl LOREBURN: The decision of Native law seems to be unprecise at present. At the same time your proposition really is they would have no right to alienate.

Mr. LESLIE SCOTT: They had no right to alienate unless all the indunas consented.

THE LIPPERT CONCESSION.

Mr. LESLIE SCOTT: I believe in Rhodesia, broadly speaking, most of the land was occupied by the Natives. This question of occupation and the question of the limitation of the power that Lobengula intended to grant by the Lippert Concession is necessarily one of degree. He could not possibly have intended Lippert to part with to Europeans the whole of the land over which he, Lobengula, was king. He could not have intended Lippert, for instance, to deal with and grant the land upon which the royal kraal was situated, or the land upon which the kraals of any of the indunas were situated, nor the townships as they were called where the various tribes and clans under him were living, nor that the grounds which they were cultivating nor such amount of pastural land as was necessary to maintain the pastural rights of the king should be dealt with.

Earl LOREBURN: Be it so; I want, with Lord Sumner, to get something precise. Let me point out the three things you stated just now. You say that the Lippert Concession did not apply to lands which were in the occupation of Natives tribally; that is what you have said.

Mr. LESLIE SCOTT: I have.

Earl LOREBURN: You say that occupation of Natives tribally means lands over which the cattle grazed; therefore the Concession did not apply to that.

Mr. LESLIE SCOTT: It excludes those.

Earl LOREBURN: But the Lippert Concession did include lands over which there were tribal rights, though they were not actually occupied?

Mr. LESLIE SCOTT: Yes, I say that for this reason.

Earl LOREBURN: Let us get a clear conception of the propositions you are advancing.

Mr. LESLIE SCOTT: Those are the propositions I am advancing, and I am advancing a fourth, in order to make it clear that the line of demarcation between two and three must be a question of degree. I mean this; it is clear that Lobengula, if asked at the time, would have said all the land in my kingdom is occupied by my people. It is also clear that if he was not intending to allow any land occupied in that sense to be dealt with by Lippert, he was giving Lippert nothing; therefore it is quite clear he could not have intended to refuse to Lippert the power of making grants over land occupied in that sense; conversely, on the other hand, it is quite plain, I submit, he could not have intended to give Lippert power to deal with lands in the actual living occupation of himself and his indunas or his people, nor of the lands they were engaged in cultivating for their livelihood or using for pastoral purposes. The real truth of the matter, I suspect, is this, that the proper interpretation to give to this is that he expected to remain king of the Matabele nation, and that at any time if Lippert granted land which he, Lobengula, thought was in the occupation of his people he, Lobengula, might intervene and say: That must not be given. On the other hand, if the land that was granted by Lippert was land which Lobengula and the Natives generally did not regard as occupied land, then if the concession was a valid concession Lippert would be able to grant that land. The kind of line of demarcation that I submit is the only line

of demarcation possible, is to find a middle line between those two conflicting views, both of which contain a truth, which cannot be denied, namely, that he could not have intended to give all his land and that he could not have intended to give none; it is somewhere between the two.

If your Lordships would look at page 77 of Appendix A, you will find that the Company themselves accept this view that I am contending for, that the Concession was limited to unoccupied lands. On the 14th December, 1891, three months before they got the transfer, the Secretary of the Company writes to the Imperial Secretary at Cape Town: "I am instructed to state, for the information of his Excellency the High Commissioner, that the managing director has perused the Concession granted by Lobengula to Edward Lippert on the 17th November, 1891, empowering him, subject to certain payments, to lay out, grant, or lease farms, townships, building plots, and grazing areas, and generally to deal with the unoccupied lands within the kingdom of Lobengula for the full term of 100 years, and that on behalf of this Company Mr. Rhodes has no objection to offer to the said Concession being ratified by his Excellency the High Commissioner." That is three months before the transfer to the Company. This is in December, 1891, and the transfer was in February, 1892.

Lord SCOTT DICKSON: It is after the concession to Lippert.

Mr. LESLIE SCOTT: Yes, but before the Company got it. That is their view.

Earl LOREBURN: That is your contention with regard to the construction of the Concession.

Mr. LESLIE SCOTT: On that point, my Lord.

Then one word about the contention which my learned friend, Mr. Lawrence, advanced on interpretation, that it must be treated as limited in its terms to the life or sovereignty of Lobengula or the continuance of the Matabele sovereignty. I submit, according to its language, that is so; that the power is limited to granting "certificates in my name"; and that, I submit, is conclusive on that point.

Earl LOREBURN: You adopt Mr. Lawrence's contention with regard to that?

Mr. LESLIE SCOTT: Yes, my Lord; but I want to add one further submission, and that is this, not on the language of the Concession but on what, I submit, must be regarded as an implied term of it, that Lobengula could not, and the indunas in giving their consent could not, have intended to give a power to an agent to deal with the land to last or to endure after the Matabele sovereignty had been brought to an end; that it would be contrary to good sense to suppose that the power was to last in that event. There is one other point on interpretation, and that is, I submit, that the payment of the £500 is a condition of the continuance of the delegated authority. It is like a rent.

AN AMAZING DOCUMENT.

Mr. LESLIE SCOTT: I am on the point that the Company did not act on it (the Lippert Concession) after the war in 1893, and I am pointing out, first of all, that they acted without it before; that is all. Then in 1893, before the war, on the 14th August, at page 92 of Appendix A, your Lordships will find the Company entered into an agreement for conditions of service with the members of the Victoria Force for Matabeleland, and

your Lordship will see here that they agreed to grant land, as Mr. Rhodes put it subsequently, in right of conquest. I want your Lordship to read the whole of this, because I submit it shows the way in which the Company were completely disregarding all Native rights of land and not acting on the Lippert Concession: "The following are the conditions of service for the members of the Victoria Force for Matabeleland: (1) That each member shall have protection on all claims in Mashonaland until six months after the date of cessation of hostilities. (2) That each member will be entitled to mark out a farm of 3,000 morgen in any part of Matabeleland. No occupation is required, but a quit-rent will be charged on each farm of ten shillings per annum. (3) That no marking out of farms and claims will be allowed, or held valid, until such time as the Administrator and the commanders of the different columns consider the country sufficiently peaceful, and a week's clear notification will be given to that effect. (4) That members be allowed four clear months wherein to mark out and register their farms, and that no such marking out or registration will be valid after that time, with the exception of the rights belonging to members of the force killed, invalided, or dying on service. (5) The Government retain the right at any time to purchase farms from the members at the rate of £3 sterling per morgen, and compensation for all improvements. This does not include the purchase of claims already pegged out on farms." Then there is a reference to alluvial claims.

Earl LOREBURN: This shows that before the Expedition they promised the men certain lands, and it may be, as you say, that they were treating themselves as entitled to give it by right of conquest.

Mr. LESLIE SCOTT: Your Lordship will remember the very limited proposition for which I cite this, namely, that the Company did not act on the Lippert Concession.

Earl LOREBURN: They acted on some other power which they thought they had.

Mr. LESLIE SCOTT: Quite.

Earl LOREBURN: That does not affect it.

Mr. LESLIE SCOTT: Possibly it is a pure question of Native law and the interpretation of the document as to whether it comes to an end with the sovereignty of Lobengula. That was my proposition. I merely quote this as showing that was a view shared by the Company at that time. Then paragraph 7: "The 'loot' shall be divided: one-half to the B.S.A. Company and the remainder to officers and men in equal shares." That I quote as showing that they regarded it as an agreement made in view of conquest.

BRITISH CROWN RIGHTS—PROTECTORATES.

Mr. LESLIE SCOTT: Now, my Lords, I want to say a little on the question of the status of the Protectorate and the rights of the British Crown when the British Crown is the protecting Power and the Protectorate in question is not the normal Protectorates known in the past but an African Protectorate.

Earl LOREBURN: What is the proposition you want to establish?

Mr. LESLIE SCOTT: There are two propositions I think involved. One is that where the Protectorate is continued after such a conquest as there was here, it cannot be said as a matter of constitutional law that the same rights arise as would arise if there had been a conquest and annexation. Whatever may be the position in the case of annexation, or what-

ever be the true meaning of Lord Mansfield's Judgment in Campbell v. Hall as to the power of the conqueror to take the private property of individuals, my submission is that when the conquering Power either assumes or maintains a protectorate no such inference can arise. It cannot be inferred or presumed that the conquering Power intends to take or deal with in any way, by an executive act, the private property in land of the subjects of the conquered Power.

Earl LOREBURN: Do I understand you to say because it announces itself as a protectorate and uses the term "protectorate," that that precludes it from exercising its rights as a conqueror?

Mr. LESLIE SCOTT: Yes, for this reason, that the rights which follow upon conquest follow not logically or in law upon the mere fact of conquest, but upon the act of annexation which usually follows conquest.

Lord ATKINSON: Do you mean that, or do you mean that from the fact that they announced they were only continuing a protectorate, you may presume from that that they do not intend to exercise their rights as conquerors.

Mr. LESLIE SCOTT: I put it that way conversely.

Earl LOREBURN: That is more intelligible; the other was more up in the clouds. You say in this case the Crown did not exercise the rights, that is what it comes to; they could not have, as you say, but they did not exercise the rights of interfering with private property.

Mr. LESLIE SCOTT: Yes, to put it as Lord Atkinson put it, if they had so intended, they would both have annexed and said what they were doing.

Now, my Lords, there are certain passages in the documents which throw light upon this because they are State documents where the Crown through the Secretary of State for the Colonies has expressed certain views on this particular subject and I think it is convenient to take those first, before I refer to one or two authorities. Your Lordship will find this document in Volume A, page 4. I am dealing with the whole question of the status of the protecting Power, including the question of conquest, and as an incident so to speak, on page 4 of Appendix A there is a letter in relation to Bechuanaland, but the principle applies here. The High Commissioner for South Africa writing to Sir Charles Warren (who I think was Special Commissioner in Bechuanaland), with regard to a claim of the Rev. A. Robinson respecting certain lands claimed by him in Mankoroane's country, says this at line 35: "I may point out in this connection, that, as the position of Her Majesty's Government in Bechuanaland does not amount to sovereignty, the waste lands not required by the chiefs are vested in the chiefs themselves, and not in the Crown. It would be impossible, therefore, for Her Majesty's Government to appoint a Land Commission for the purpose of alienating land, as they are not possessed of the land to be alienated. A proper course, in my opinion, would be to ascertain the territorial right of the chiefs, and then to leave the chiefs and their councils to decide on the claims to land within their territories. For this purpose they might receive the assistance and advice of your officers, but I do not think that, until annexation takes place, it would be proper to assume the direct control of the land settlement of the country."

Earl LOREBURN: About Bechuanaland. We have got a number of documents relating to this particular territory, and the question is whether

this Concession applied, what was done, and what was the status taken by the Crown with regard to this country.

Mr. LESLIE SCOTT: I want your Lordship to appreciate why I refer to it. I do not refer to it because it is Bechuanaland, but merely to show the official view expressed in an official dispatch as to what the powers of the Crown are, the constitutional powers of the Crown in a Protectorate. I will read one passage from the one dispatch that I want to refer to in 1895 at page 174. This is in the dispatch I referred to for another purpose just now. It is a dispatch from Mr. Chamberlain, and at the bottom of page 174, paragraph 10, it says: "With regard to paragraphs 7 and 8 of your letter, I am to observe that the acquisition of land in Montsoia's, Ikaning's and Lenchwe's countries, beyond what is actually required for the railway, will be a matter of arrangement between the Company and those chiefs, and in this connection I am to refer you to the extract from Mr. Chamberlain's telegram of the 14th ultimo, already enclosed. You are aware that the Crown, although as the Administrative authority it takes and uses certain areas for public purposes, does not claim the ownership of Lands in Native occupation in a Protectorate. It cannot, therefore, be asked to grant to your Company what it has not claimed for itself." That is a perfectly general statement about the Crown's attitude to Protectorates. Then he goes on to deal with the case of three chiefs who had given up certain land, so that it had become vacant land, and the Crown would thereupon get a title. Then in paragraph 12 he goes on: "It remains to consider the question of title in the Southern and Western parts of the Protectorate which will come for administrative purposes under the Company. As regards those parts which are in the beneficial occupation of Natives, such as the lands of other Maroquin Baralong (South of Bathoen) and the lands actually used by Sekhome and his tribe (near Lake 'Ngami), Mr. Chamberlain can only repeat the observation already made, that the Crown cannot grant what it does not claim for itself. There are, Mr. Chamberlain believes, undoubtedly other lands in the Protectorate to which no just Native claim exists, and these he considers that the Company may take possession of and by virtue of their occupancy may make title to."

Now, summing up the attitude of the Crown as shown by these documents, in a Protectorate, where the land is absolutely vacant, where there is vacant land, the Crown will assume the right to deal with it, but when it is in the occupation of any tribe, the Crown cannot deal with it, because it has no right to deal with it; that is its attitude as protecting Power.

In a collection of papers by the late Professor Westlake, published in 1914, and edited by Mr. Oppenheim, the author of a standard work on International Law, intituled "The Collected Papers of John Westlake on Public International Law," at page 181 there is an interesting passage about Protectorates: "In the civilized world a Protectorate has long been familiar as a relation existing between two States, and which the protected one is controlled or even wholly represented in its foreign affairs by the protecting one, while the latter has such authority in the internal affairs of the former, if any, as the arrangements between them provide for." Then he gives illustrations of the old form of protectorate; then he goes on on page 182: "Where there is no State, that is to say, in an uncivilized region, there can be no protected State, and therefore no such Protectorate as has been described in the last paragraph. But in recent times a practice has arisen by which in such regions civilized powers assume and exercise certain rights in more or less well defined districts, to which rights and districts, for the term is used to express both

the one and the other, the name of a Protectorate is given by analogy. The distinctive characters of those rights are, first, that they are contrasted with territorial sovereignty, for, as far as such sovereignty extends, there is the State itself which had acquired it, and not a Protectorate exercised by that State; secondly that the Protectorate first established excludes all other States from exercising any authority within the district, either by way of territorial sovereignty or of a Protectorate—that is to say, while it lasts, for the question remains whether a Protectorate, like an inchoate title to territorial sovereignty, is not subject to conditions and liable to forfeiture on their non-fulfilment; thirdly, that the State enjoying the protectorate represents and protects the district of its population, native or civilized, in everything which relates to other Powers. The analogy to the protectorates exercised over States is plainly seen in the last two chapters, exclusiveness and representation with protection. It is less visible in the first character, for, where there is a protected State, the territorial sovereignty is divided between it and the protecting State according to the arrangements existing in the particular case, while in an uncivilized protectorate it is in suspense. But on the whole the analogy is sufficient to account for the extension of the old term to the new case, although to account for is not necessarily to justify, and perhaps it might have been better had a new term been used."

Earl LOREBURN: What is the proposition of law you quote this for? It is an interesting dissertation by a very learned gentleman.

Mr. LESLIE SCOTT: The protecting Power only assumes a modified sovereignty so to speak, excluding all foreign power and protecting the subjects within the province of the protectorate. In other words, it is a negative proposition that it does not amount to a full sovereignty.

Earl LOREBURN: It depends upon what the protecting Power does.

Lord ATKINSON: I think you must start from 1894; the British Government did exercise many powers of sovereignty in this region; they established courts, which is one of the indicia of sovereign Power, and many other things, administrators, magistrates, land registry, and everything of that kind.

Mr. LESLIE SCOTT: They were all under the Foreign Jurisdiction Act of 1890.

Earl LOREBURN: A protectorate is what the protecting Power makes it; there is no classical definition of what a protectorate is.

Mr. LESLIE SCOTT: I think the proposition that I am concerned to submit in regard to it is simply this, that no presumption or inference is justifiable that the protecting Power has intended whilst continuing the status of protectorate, to take from the protected subjects the private property in land which they own.

Earl LOREBURN: What you mean, I think, is this, if I may say so, that the protecting Power did not interfere with the tribal rights; that is what you are driving at in this case.

Mr. LESLIE SCOTT: Precisely. The reason I referred to that passage was that it shows the views of an international lawyer of great repute as to what a protectorate is, and my submission is that that being what a protectorate is, no inference of an intention to interfere with tribal rights can be inferred. The question of the jurisdiction of Her Majesty in foreign protec-

torates where Orders in Council for legislative purposes are made pursuant to the Foreign Jurisdiction Act of 1890 was considered in the Court of Appeal in the case of the King v. Earl Crewe in 1910, 2 King's Bench, at page 576, in the case where an application was made by a Native chief called Sekgome, your Lordships may remember, for habeas corpus. The headnote is this: "By an Order in Council dated May 9, 1891"—that is the Order in Council which is relevant in this case; it included Bechuanaland as well as Matabeleland and Mashonaland—"made 'in exercise of the powers by the Foreign Jurisdiction Act, 1890, or otherwise in Her Majesty vested,' the High Commissioner for South Africa was authorised to exercise in the Bechuanaland Protectorate the powers of Her Majesty, and to do all such things 'as are lawful' to provide by Proclamation for the administration of justice and generally for the peace, order, and good government of all persons within the Protectorate, including the prohibition and punishment of all acts tending to disturb the public peace. One Sekgome, who claimed to be the chief of a native tribe in the Protectorate, was detained in custody at a place within the Protectorate by virtue of a proclamation authorising his detention, and expressed to have been made by the High Commissioner, under the powers conferred on him by the Order in Council, on the ground that the detention of Sekgome was necessary for the preservation of peace within the Protectorate." Then there was an application for a writ of habeas corpus. It came ultimately before the Court of Appeal, and on page 594 Lord Justice Vaughan Williams dealt with the Foreign Jurisdiction Act: "Having dealt with these preliminary questions, I will now pass to the discussion of the question of the validity of the proclamation. The first statute to which I will call attention to the Foreign Jurisdiction Act, 1890, which recites: 'Whereas by treaty, capitulation, grant, usage, sufferance, and other lawful means, Her Majesty the Queen has jurisdiction within divers foreign countries, and it is expedient to consolidate the Acts relating to the exercise of Her Majesty's jurisdiction out of her dominions': "—Then his Lordship quotes the sections from the Act of Parliament. Section 1 is: "It is and shall be lawful for Her Majesty the Queen to hold, exercise and enjoy any jurisdiction which Her Majesty now has or may at any time hereafter have within a foreign country in the same and as ample a manner as if Her Majesty has acquired that jurisdiction by the cession or conquest of territory." Then I need not read the other sections that the Lord Justice cited. He goes on at the top of page 596: "I have read the observations of Mr. W. E. Hall upon page 221 of his book on Foreign Jurisdiction of the British Crown, in which he says that it is doubtful whether this Act or any of the prior Acts relating to foreign jurisdiction deal with anything else than a strictly extra-territorial jurisdiction limited to His Majesty's own subjects. I think that the power given by section 5 of the Act of 1890 to extend the operation of certain repealed enactments in the first Schedule to any foreign country in which for the time being Her Majesty has jurisdiction as if the country were a British possession, and as if her Majesty in Council were the Legislature of the possession, rather favours the limitation of the Statute to Her Majesty's subjects suggested by Mr. Hall." Then the Lord Justice comes to the conclusion, as your Lordships see is indicated there, that under the Foreign Jurisdiction Act, Her Majesty did get power to legislate by Order in Council so as to affect everybody within the Protectorate.

SOVEREIGNTY.

Mr. LESLIE SCOTT: The next point of the argument that I want to deal with is one that your Lordships may intimate to me it is unnecessary I should argue, because your Lordships may accept the proposition. It

* * *

is this: There is a fundamental distinction between the acquisition of territory by a transfer of sovereignty and the acquisition of land which is within that territory. Territory is an expression appropriate to acquisition of sovereign jurisdiction. Land is a question of private or public property. I respectfully submit that in the argument of the Legislative Council's case there is a confusion between the two ideas. I submit in that case, first of all, that there was a complete transfer of sovereignty from Lobengula to the British Crown, secondly, that that carried with it complete dominion over Lobengula's territory, two propositions which in one sense I should controvert, but as a result of that transfer the Natives had no right in their land unless the Crown gave it them. That is a fallacy in my submission.

Earl LOREBURN: I think, speaking for myself, to say there was a conquest which placed everything at the disposition of the Crown, is a different thing from saying the conquest resulted in the acquisition of this private right. I personally agree with you upon that.

Mr. LESLIE SCOTT: If your Lordships look at the Legislative Council's case, that is the effect of the case as a whole. They say because sovereignty passed, therefore the Natives lost their property in the land except to the extent to which the Crown expressly granted it to them. To some extent I think that view appears in the Crown's case, and that, I submit, is a fallacy.

Earl LOREBURN: The boot is on the other leg, that all private right would remain until they could be interfered with. I am giving you my own view of it.

Mr. LESLIE SCOTT: There is a very short summary of the law on that point—territorial sovereignty, in chapter 9, page 131, of Mr. Westlake's paper.

Earl LOREBURN: Does he take that view?

Mr. LESLIE SCOTT: Yes. If that be a sound question, the next question logically is whether the Crown did, by any Act that would be effective, divest the native title. My submission is it did not.

There is a passage in 6 Peters in the case of The United States v. Arredondo, a case of the Supreme Court. That is in 6 Peters at page 691, and it was decided in the year 1832. It is a judgment of Chief Justice Marshall, in which he quoted the earlier judgment of the Court. It is only for the quotation on page 733 for which I cite it: "Whatever the legislative power may be, its acts ought never to be so construed as to subvert the rights of property, unless its intention to do so shall be expressed in such terms as to admit of no doubt, and to show a clear design to effect the object. No general terms intended for property, to which they may be fairly applicable and not particularly applied by the legislature, no silent implied and constructive repeals ought ever to be understood as to divest a vested right."

Lord ATKINSON: There is no doubt in the proposition that in conquest the conqueror can do as he likes. He may put the population to the sword and take their property; but, if he does not do that, the private right of property is presumed to continue.

Mr. LESLIE SCOTT: When he comes to legislate it will not be presumed, unless he uses clear words to that effect in that legislation, that he intends to take away private rights. I will come now to the legislation after the war.

Earl LOREBURN: In considering this case on this particular point, which is one for you of great importance and of public importance, there is always this to be remembered, that in looking at these Proclamations I think that the general overriding purpose and the basis of legislation by Ordinance, and so forth, was to do what you may call civilizing by the introduction of a white population, and, therefore, of course the scheme was to colonize, so to speak. I do not say that has any necessary bearing on any particular Ordinance, but that is the general purpose I think as disclosed in the Proclamations. It may have a qualifying effect upon the different Proclamations.

Mr. LESLIE SCOTT: I should accept that completely as a consideration to bear in mind in interpreting the legislation.

Lord ATKINSON: Does not the conquering power by supposing the planting of people and the confining of the native population to particular reserves express its will that a general right over the whole country shall no longer exist?

Mr. LESLIE SCOTT: My submission is no.

Earl LOREBURN: It would appear to me by the confining of them to the enjoyment of special reserves they cannot have the right over the whole surface; but it is confined to the reserves.

Mr. LESLIE SCOTT: I understand that is the argument advanced against the Natives' case; and, in my respectful submission, it is the only argument in the whole of these proceedings against the Natives' case.

Earl LOREBURN: They take away the common and give them the several and exclusive.

Mr. LESLIE SCOTT: It is contended that the Order in Council of 1894 was a piece of legislation which expropriated the Native title in the whole of the land except where reserves were assigned to the Natives.

Lord ATKINSON: It expresses the will of the conqueror.

Mr. LESLIE SCOTT: Yes.

Earl LOREBURN: Could it be better put for you than in the passage on page 74 of Peere Williams, a book which my noble friend, Lord Atkinson, has handed to me.

Lord SUMNER: The position of the Chief of the tribe was such that unless he in Council chose to give permission, he had a right to exclude all white men from his tribe's territory, at any rate, exclude them from any permanent residence.

Mr. LESLIE SCOTT: I hesitate to say yes, because I was wondering to what extent sovereignty melted into ideas of ownership.

Lord SUMNER: It may be as Sovereign he gave them permission to come in, but it would be an infringement of tribal rights in the soil if disregarding the refusal to give permission the white man came and travelled over and trespassed upon the Native land.

Mr. LESLIE SCOTT: Again I do not know to what extent the Native law permitted voyaging over the surface, or to what extent they might regard it as a trespass.

Lord SUMNER: You will have to take up some definite position upon that, I think. If it is not mentioned by any of your witnesses, I think

you will have to say whether it is involved in your conception of the Native rights. I certainly have understood you to mean, although the Sovereign may be trustee for his tribe and require certain consents and so forth, amongst them the nature of their title was such that they could resent his trespass or any entry on their tribal territory.

Mr. Leslie Scott: I say yes to that.

Lord Sumner: I understood you to say the whole of Southern Rhodesia was completely covered by this system, that is to say, whether the different tribes may amongst them have covered the whole surface.

Mr. Leslie Scott: I am not in the position, with the information at my disposal, to put it in that form, and to say the whole surface is covered. It may be, but I cannot say. There were certain spaces, to use Mr. Chamberlain's expression, which were not beneficially occupied by the Natives at all over which a king might claim sovereignty and over which there was no ownership in the tribe. It is in view of that I intimated at the commencement of my argument, that your Lordships might think it necessary to give advice in general terms so as to permit of an examination on the spot to ascertain what the position is, bearing in mind always that I am not asking to go outside the scope of the Reference which for practical purposes excludes the consideration the piece of land already alienated by the Reference.

Earl Loreburn: Subsequent inquiry in order to apply the advice is not inconsistent, of course.

Lord Sumner: Subject to that inquiry, which I think must be fruitless because I do not see how the facts can now be ascertained, but be it as you like, the maintenance of the old rights as you contend for and a free admission of white settlers as the Crown authorizes, seem to be incompatible things. Unless you assume the unoccupied lands were accessible without trespass on the native lands and there were such occupied lands, no white man could settle there without the consent of the native chiefs on behalf of their tribes. Surely that system at any rate was abandoned with the authority of the Crown, which directly lent itself to the opposite system of allowing white settlement generally all over the country, subject to a provision for Native reserves for special Native cultivation.

Mr. Leslie Scott: I submit that the Crown and the Company together proceeded in 1894 on a tacit assumption, of which very likely they were not fully conscious, that the Native had no right to property in the soil, and that is the gravamen of the complaint I am advancing respectfully on behalf of the Natives. What I submit would have been right and may be the consequence of your Lordships' advice, if your Lordships accept my contention, is this, that they ought to have proceeded on the footing that the Natives had the legal right in such part of the soil as could not be treated as really unoccupied land—unoccupied land cannot be dealt with differently, but they ought to have proceeded on the assumption that the Natives had a right in the occupied land just as in the United States and elsewhere.

Earl Loreburn: Supposing you maintain and establish, under misapprehension or otherwise of the law, the Crown did in fact ignore the Natives' right, being the conquerors, then, whether they knew of the real rights or not, may have the effect of extinguishing it and extinguishing this point in your argument.

Mr. Leslie Scott: I was alive to the red lamp. My answer to it

is this, and it is twofold. Firstly, that an intention to take away private property ought not to be interpreted into the Crown legislation unless the legislation is clear on the point, if it is capable of being understood as leaving the question open, and that is what I submit the Crown did; and, secondly, that what they did they did, not in the exercise of prerogative power but pursuant to the Foreign Jurisdiction Act. In 1894 there is the new Proclamation again reciting a Protectorate.

Earl LOREBURN: That is the one of the 18th July, 1894.

Mr. LESLIE SCOTT: Yes, precisely, and with no hint in it of exercising any rights based upon conquest. On the continuing page first of all it says in line 7: "Whereas the territories of South Africa situate within the limits of this Order, as hereinafter described, are under the protection of Her Majesty the Queen: And whereas by treaty, grant, usage, sufferance, and other lawful means, Her Majesty has power and jurisdiction in the said territories." It is not based in any sense on the right of conquest, and annexation is, so to speak, definitely declined, and it is made under the Foreign Jurisdiction Act. As the Court of Appeal said, this document is called an Order in Council, but it is really a statutory Order made under the powers of an Act of Parliament.

Lord ATKINSON: Or otherwise.

Mr. LESLIE SCOTT: The view, I submit, taken by the Court of Appeal in that case was this: that those words do not really add anything. The only jurisdiction the British Crown has in a Protectorate is that which is conferred upon it by Parliament by the Foreign Jurisdiction Act. They do those things which the Act of Parliament says it may do in a Protectorate. I rely very strongly on the election of the British Crown if it had an election, which I assume it had, not to annex and not to proceed in the rights of the conqueror. Part 2 is with regard to administration, and Part 3 is judicial, and Part 4 is the Land Commission. "A Land Commission is hereby constituted, consisting of a Judicial Commissioner and two other Commissioners. (45) The Judicial Commissioner shall be the Judge, or if at any time there be more than one Judge of the High Court, then such Judge as the High Commissioner shall from time to time appoint under his hand and seal. (46) One of the Commissioners other than the Judicial Commissioner shall be selected by a Secretary of State and one by the Company, and both shall be appointed by the High Commissioner under his hand and seal." Then paragraph 49 is: "The Land Commission shall deal with all questions relating to the settlement of Natives on the lands in that part of the territories within the limits of this Order which is known as Matabeleland."

Lord SCOTT DICKSON: Are you agreed that includes Mashonaland?

Mr. LESLIE SCOTT: No. That was the point.

MASHONALAND AND MATABELELAND.

Lord ATKINSON: Mr. Leslie Scott, would you pardon me for calling your attention to pages 9 and 11 of Appendix A. 9 is the treaty of peace and amity, and then on page 11 there is a letter from Sir George Bonham in Lisbon to the Marquess of Salisbury with a memorandum at the foot of it, in which he says: "The territory which Her Majesty's Government consider to be within the sphere of British influence comprises Khama's country, which he has offered to Her Majesty's Government, and the Matabele Kingdom of Matabeleland, Mashonaland and Makalakaland, in respect

of which a treaty has been concluded between Her Majesty's Government and King Lobengula." Does not that show that Lobengula's kingdom comprised Mashonaland?

Mr. LESLIE SCOTT: My Lord, it shows this, and that I have conceded as on the documents, as it is perfectly plain that I must concede: (1) That Lobengula claimed sovereignty over Mashonaland; (2) that the British Crown made a treaty of amity with Lobengula treating him as King of Mashonaland as well as Matabeleland to the extent of recognizing his claims. What effect that has on the position here is another matter, but I do not dispute that Lobengula did claim that power, and that as a matter of international comity, the treaty between this country through Queen Victoria and Lobengula gave him the appellation which he gave to himself, and it was in relation to that type of question that I ventured to refer to certain passages in Mr. Secretary Chamberlain's letter when Secretary of State to the Colonies, relating it is true not to Matabeleland and Mashonaland, but to Bechuanaland, for the purpose of showing the official view that the fact that Lobengula raided into a district did not make him sovereign of the district.

Lord ATKINSON: Yes, but the treaty begins: "The Chief Lobengula, ruler of the tribe known as the Amandebele, together with the Mashona and the Makalaka, tributaries of the same, hereby agrees to the following articles and conditions."

Mr. LESLIE SCOTT: Your Lordship sees my point, that there is a question of fact over and above the mere international recognition by these claims of Lobengula's sovereignty which has a bearing on two aspects of the case. The question of fact is as to what area had he sovereignty over, and bearing on that question over what area had he in fact sovereignty, I cite official documents expressing the view that that must be a question of reality and not a question of mere claim accompanied by various raids.

Lord ATKINSON: There is no suggestion as to who was the Chief of Mashonaland if Lobengula was not.

Lord SUMNER: Does not the Rudd Concession put an end to this point? The Crown always recognized that the Rudd Concession gave validly the rights it purports to give, and it purports to give these rights: "I Lobengula, King of Matabeleland, Mashonaland, and other adjoining territories, in the exercise of my sovereign powers, and in the presence and with the consent of my Council of Indunas do hereby grant and assign unto the said grantees, their heirs, representatives and assigns, jointly and severally, the complete and exclusive charge over all metals and minerals situated and contained in my kingdoms, principalities and dominions." So that as soon as the Crown recognized that act as giving the title it purports to give, unless there is something very strong to the contrary, not mere general expressions about slave-raiding, and things of that kind, I should have thought it showed Lobengula was recognized as King of Mashonaland, capable and competent to dispose of all the minerals throughout that kingdom.

Mr. LESLIE SCOTT: It is conclusive that this Crown recognized him as King of Mashonaland, I will concede that in argument respectfully, but that admission does not touch, I submit, either of these two points: (1) The conditions under which Lobengula as such king could make a valid alienation of land under Native law; that is the Lippert Concession point nor does it, I submit, touch the argument based upon conquest.

Lord SUMNER: Very likely not, but it does conclude, does not it, that

if by Native law in Mashonaland it required a sovereign chief, or whatever he was called in a pitso or something of that kind, to grant the property of the tribe, then Lobengula was that chief, the person who could do it, but whether it was done with all the recognized formalities whether sufficient blood was shed, and all that may remain to be inquired into.

Mr. LESLIE SCOTT: I would venture to submit that would be rather a hazardous inference to draw on the material as to Native laws and customs that is before your Lordships or that I can put before your Lordships.

Lord SUMNER: I do not think it proves anything about Native laws and customs, but if you prove that by Native law and custom some paramount chief or occupant of a throne was required to make this grant, then there is the chief; that is the man who is chief.

Mr. LESLIE SCOTT: True, and I should not respectfully quarrel with that, but what I have in mind is merely this, that it may be on the information I possess and can put before your Lordships it looks as if it was not the fact that in order that there should be an effective alienation of land by any tribe owning the land the consent not merely of some paramount chief, but the particular chief of that tribe and the indunas attached to that chief would be necessary.

Lord SUMNER: That is very different; that is like Home Rulers.

Mr. LESLIE SCOTT: I am not certain, my Lord, that it is clear. I submit rather that it is not.

Lord SUMNER: Your view is that King Lobengula in Mashonaland might make the grant with a Mashonaland indaba, and in Matabeleland he might do it with a Matabeleland indaba, and in Makakalaland with a Makakalaland indaba, but *non constat* it is a United Kingdom.

Mr. LESLIE SCOTT: In this respect I want to remind your Lordships of the peculiar difficulty I am in in giving to your Lordships information about Native laws and customs on this sort of point that I ought to have been in a position to give.

Lord ATKINSON: That I do not think is really the point. The point is, was not this a conquest of Mashonaland just as much as of Matabeleland?

Mr. LESLIE SCOTT: No. I have said, my Lords, all I wanted to say really on the one point upon which this question of sovereignty is material, namely the question of alienation of land under Native law; that is the Lippert question part of it, for the moment, and now may I address myself to Lord Atkinson's point, the question of conquest. A great deal has been said about conquest here which I submit is really either fallacious or beside the mark in this way. The dominant fact here is that the whole of this territory in Southern Rhodesia, including both Matabeleland and Mashonaland, had been a British Protectorate since 1891. It continued a protectorate after the war of 1893. The Crown deliberately abstained from making any change whatever in the constitutional status of the country in the relation of this Crown to that country and its people. The war in 1893 I submit was really in fact a domestic matter where there was a rising of a part and a subjugation of that part of the peoples concerned. It is suggested that the fault lay entirely with the Matabele, my instructions are otherwise from certain points of view; but I regard it as irrelevant to this matter to consider who was to blame in that war, and I therefore say nothing about it deliberately, but the essence of the matter is, I submit, that there was no war in the part of the territory known as Mashonaland;

there was no rising there, there was a complete continuity of the state of affairs that had been in existence for some two years already, and I cannot see why the fact that the rising took place in Matabeleland and was there suppressed altered the constitutional status of the relations between the Crown of this country and Mashonaland. That is what I submit is, so to speak, the traditional aspect of this question of conquest.

Earl LOREBURN: You say in a word there was no conquest of Mashonaland?

Mr. LESLIE SCOTT: Precisely.

WHERE IS THE OWNERSHIP?

Lord ATKINSON: Who are the owners, the whole body of Natives?

Mr. LESLIE SCOTT: No, I answered that before, my Lord; if I may repeat it, each individual tribe.

Lord ATKINSON: As the owners of the soil that the members occupy, is that it?

Mr. LESLIE SCOTT: Yes, my Lord, that is near enough for my purpose. I approach that point simply from this point of view, they were in fact occupying and enjoying the soil; it is clear that when there were any Natives there there was no other owner, and the conclusion necessarily follows, I submit, that they were therefore the owners.

Earl LOREBURN: They had the complete title, each individual tribe to its own portion?

Mr. LESLIE SCOTT: Yes, leaving open the question which for my argument does not in the least matter, as to whether under Native law the paramount chief, Lobengula in this case, so to speak, shared in the title; whether the title was vested in him and each of the tribes, or whether it was vested severally in the tribes, is quite immaterial for my purposes. They had joint ownership.

Earl LOREBURN: The Natives had the complete title?

Mr. LESLIE SCOTT: Yes. Then my submission is that the Lippert Concession for the reasons given was not valid; it did not extend beyond this limited area, and came to an end on the death of Lobengula, and so on. Never mind about repeating the reasons why I submit the Lippert Concession ought to be disregarded; I simply put the second proposition that for the reasons given the Lippert Concession ought to be disregarded. Now, that being so, what was the position of affairs before the war of 1893 began? That is the next thing. My submission is that what I have already submitted still continued to be the legal position of affairs with regard to the ownership of the land of the country.

Earl LOREBURN: That is after the war?

Mr. LESLIE SCOTT: No, just before the war.

Earl LOREBURN: That continued till the war.

Mr. LESLIE SCOTT: That continued till the war. The reason I say that is that the Company's Charter did not give them that; it only gave them power to acquire land by concession, and so on. Then a war happens in a limited portion of the whole country. Upon that war taking place the then existing king, who for this purpose with Lord Atkinson I will

treat as the king of the whole country, is deposed and conquered, and then there are attached to the British Crown the rights which it could exercise if it so elected, in the words of Lord Mansfield, to take the country; they could put the inhabitants to the sword and they could take the land.

Earl LOREBURN: They had the power of abolishing the title provided there was conquest of Mashonaland.

Mr. LESLIE SCOTT: Yes, but my submission is the principle enunciated by Lord Mansfield would not apply to the portion of the country where the people had been and continued in the protection of the British power, had never rebelled against it, had not fought, but had remained completely peaceful in the occupation of their land.

Earl LOREBURN: You say there was not a conquest over them?

Mr. LESLIE SCOTT: Precisely.

Lord ATKINSON: But surely that means that a battle fought with a sovereign in one corner of his country and his overthrow only affects the place in which it was fought? How can that be so?

Mr. LESLIE SCOTT: I have already admitted that would be so if it was a completely foreign country. If this country were at war with a completely foreign country that would be so; I venture to submit the position is completely altered by the facts.

Lord ATKINSON: The Battle of Waterloo was fought in Belgium.

Mr. LESLIE SCOTT: I venture respectfully to submit the ordinary position does not apply where the country in question is already in the protectorate and nineteen-twentieths of it remains perfectly peaceful.

Lord ATKINSON: If a Power conquers a country it can do what it likes with the inhabitants and the land, both with regard to their lives and their property.

Mr. LESLIE SCOTT: *Ex concessis.*

Lord ATKINSON: It may dispossess them, yet not annex. In the position of conqueror it may dispossess them and yet say we will only exercise protective powers over this conquered country. I will not annex it. If you find, dealing with the Native, anything inconsistent with their previous property, giving them something else and something different, must you not come to the conclusion that in exercise of the conqueror's power, an arrangement has been made, though the conqueror has not subsequently annexed the country?

Mr. LESLIE SCOTT: There are two answers to that. First, your Lordship puts the question, May the conqueror do it? That is a question of law. Is it consistent with the principle of constitutional law that he should? On that I certainly say there is no precedent for such a case. This is without any precedent at all. My second answer is this: Even assuming he has the power according to our law constitutionally to do it the fact that he keeps on the protectorate is a conclusive indication that he does not elect to exercise the power. That is my very respectful submission.

Earl LOREBURN: I think I follow you. I have put these down as the heads of your arguments which, if you establish them, would be a very effective argument. The Natives had the complete title, namely, each individual tribe had it, whether there was association with the king or

not. The Lippert Concession was invalid and disappeared when Lobengula went. It continued till the war.

Mr. Leslie Scott: The above position did.

Earl Loreburn: I mean that. The war came and then came the right of the Crown to end the Natives' titles, provided there was a conquest of Mashonaland, but there was not a conquest of Mashonaland, and even if there was, the Crown did not dispossess. That is the proposition?

Mr. Leslie Scott: That is my proposition.

Earl Loreburn: I am quite sure now that I have got it.

Mr. Leslie Scott: Your Lordship has it absolutely.

WERE THE NATIVES DISPOSSESSED?

Earl Loreburn: You are on the last stage of your argument. May I ask you, in order to clear up the first proposition, about the Natives not having complete title. What right there was you have discussed, and I want to say, and for myself I still think, there was some kind of right, and to my mind it does not much matter what kind of right it was, because there was some kind of right. The next proposition about the Lippert Concession being invalid and disappeared you have dealt with.

Mr. Leslie Scott: Yes.

Earl Loreburn: That that continued until the war it seems to me is obvious. Then when the war came and the right of the Crown was at the disposal of the Crown provided there was a disposal of shares there was not a conquest over Mashonaland. You have to deal with that. That is the next stage.

Mr. Leslie Scott: I am anxious to get the skeleton of the argument quite clear and I will clothe the bones in a moment.

Earl Loreburn: You will say more about that if you think it is necessary. The proposition is clear that you state. Your difficulties have been put. You say the Crown did not dispossess and there was no legislation to dispossess the Native title. That is the proposition to which you have come.

Mr. Leslie Scott: Yes. For the sake of your Lordship's note may I say I divide the question of dispossession into two heads. One is an executive act as conqueror, the second, assuming no executive act as conqueror was there legislation to dispossess?

Lord Atkinson: What do you mean by legislation?

Mr. Leslie Scott: An Order in Council.

Lord Atkinson: At all events, it is the most formal expression of the conqueror's will.

Mr. Leslie Scott: It may be. Perhaps, my Lords, my language is not very happy.

Lord Dunedin: It is more convenient to keep the term legislation to mean an Act of Parliament.

Mr. Leslie Scott: I think I was quoting the phrases of the Lords Justices in the Sekgome case.

Lord ATKINSON: Declaration of war has the effect of an Act of Parliament. In that sense you may call it legislation.

Earl LOREBURN: Would you put it this way: There was no legislation to dispossess the Natives' title by Order in Council or otherwise?

Mr. LESLIE SCOTT: Yes, my Lord, I would.

Lord SUMNER: Whether by Act of State by which subsequent to the moment of annexation any manner of taking over the ownership should be carried out, no such Act of State takes place except the Order in Council. There was no such Statute except the Orders in Council which have to be interpreted with regard to their terms, and therefore from laying hands on the Native land they provide in a limited form for some preservation of the Natives' rights.

Mr. LESLIE SCOTT: I would prefer to say, for the purpose of giving the Natives certain rights.

Lord SUMNER: They are the negative. They are the contrary of an Act of State which has the effect of annexation.

Mr. LESLIE SCOTT: There is a very important constitutional question in relation to this. The whole subject of protectorates with regard to Government by Order in Council is referred to in the case of Campbell v. Hall, and your Lordship remembers Lord Mansfield pointed out that the power of the king to act as conqueror continued until he gave a constitution to the conquered country. The moment he gave the constitution the prerogative power lapsed, and it was because he had given the constitution in that case that the Court declared what he did subsequently was void. In these African protectorates, if one is to take them and really try to apply to protectorates the analogy of conquest by a Power that is quite foreign, the moment the Crown legislates for, if I may use that phrase, passing an Order in Council providing for the good government of that territory, and is not the Crown in effect giving it a constitution, and if down to that moment the Crown has not by any Act of State manifested an intention to take the property of its newly conquered subjects, then must not one look solely at the Order in Council to see what the Crown intends to do?

Lord ATKINSON: You may limit the rights of the Natives by the very document that creates the new constitution.

Mr. LESLIE SCOTT: That may be. I absolutely accept that.

Lord SCOTT DICKSON: There is this passage on page 106 of A, where Sir H. B. Loch telegraphs to the Marquess of Ripon at line 45: "No Government is established in Matabeleland beyond what may be necessary to maintain order. There is no present extension of the Government of Mashonaland to Matabeleland. There is no appropriation of land. These questions are all dependent on future arrangements to be discussed between myself and Mr. Rhodes, and approved by Her Majesty's Government."

Mr. LESLIE SCOTT: That, my Lord, is a very relevant passage. For the moment it had escaped my memory. That was before the agreement.

Lord SCOTT DICKSON: That was the state of things at December the 29th, 1893.

Mr. LESLIE SCOTT: That is of crucial importance to my argument. What I was going to put to your Lordships was this: that there was nothing done down to the date of the agreement.

Earl LOREBURN: The Crown did not dispossess by executive act and there was no law making—I use that general phrase—to dispossess the Native title either by Order in Council or in any other way. Up to this period you have, as it seems to me, shown there was not a dispossession by an executive act, nor have we yet come upon the law-making dispossession, if any.

Mr. LESLIE SCOTT: No. Now your Lordships see why I have submitted the question of conquest is on the face of the case irrelevant. It is because in the right of conquest the Crown did nothing until it made a law by the Order in Council, which it could have done had there been no conquest, and which it did do with regard to Mashonaland without there being a conquest there. The law by Order in Council was the constitutional method for an African protectorate. Two views were taken on this subject in the Court of Appeal. Lord Justice Farwell took the view the king's powers were limited to the power conferred by the Foreign Jurisdiction Act, and Lord Justice Kennedy took the view over and above that there was a prerogative power to legislate by Order in Council in an African protectorate.

Earl LOREBURN: Is this the proposition; That when the Order in Council was made it was not an act of conquest, but was a constitutional act pursuant to the existing law?

Mr. LESLIE SCOTT: Precisely, whether the law be prerogative or statutory. That brings one to this: that the Order in Council is to be construed like an ordinary statute, and for the purpose of ascertaining its true interpretation the surrounding circumstances, of course, may be looked at to see what the position was at the time the law was made, and one of the circumstances which is of great importance, I submit, is that at that time the Natives had their complete title, whatever language we should use to describe it, in the land. Then I come back to where I was to look at the terms of the Order in Council.

Earl LOREBURN: You say that is the next fact.

Mr. LESLIE SCOTT: Yes, and that is my last proposition which I am on now. That is at page 35 of B. I very respectfully want to remind your Lordships of the sentence I quoted from the Supreme Court of the United States which Lord Atkinson said had been referred to during the hearing of a case in the House of Lords quite recently, that in interpreting legislation of this kind it must be presumed there is an intention to expropriate private property unless the language is absolutely clear. The words are so remarkable and the passage so clearly expresses what I want to submit to your Lordships that I wish to refer to them again. Whatever the legislative power may be, its acts ought never to be so construed as to take away the right of property unless its intention to do so shall be expressed in such terms as to admit of no doubt and to show a clear design to effect the object.

Lord ATKINSON: That refers to Acts of Parliament.

Mr. LESLIE SCOTT: To any legislation. It says whatever the legislative power may be. And it says that no general terms are intended for property to which they may be fairly applicable and not particularly applied by legislation.

Lord SCOTT DICKSON: You do not want to go to America for the proposition set out in that case.

Earl LOREBURN: I think you may suppose we are not going to take the view that you lightly dispossess people of property.

Mr. LESLIE SCOTT: I only venture to quote that because of one or two points that have been put to your Lordships on interpretation. The first thing that is clear about this Order in Council is that there are no express words taking from the Natives their title in the land.

Earl LOREBURN: In help of your argument on page 35 no doubt you are going to point out that the recital recites that the territories are under the protection.

Mr. LESLIE SCOTT: Precisely. There is no reference to conquest at all there. Then your Lordships come straight to Part 4 on page 42 about the Land Commission, and I venture to think that it is clear that this portion of the Order was intended to be limited to that part of Southern Rhodesia which was technically called Matabeleland. I will not waste time now in giving your Lordships the references, but I can give a reference which makes that quite clear I think. If Lord Atkinson, who put the point, will bear in mind I will give the reference that I think establishes that quite clearly. Then there was urgent and immediate need for settling the population. The articles on it are 49 and 54.

Lord ATKINSON: On page 29 of Appendix A they recite in this Order the Petitioners' desire to carry into effect various concessions.

Mr. LESLIE SCOTT: That is the Petition for the Charter in 1889.

Lord ATKINSON: I beg your pardon.

Lord SUMNER: Are you going to come to Part 4 of the Order in Council?

Mr. LESLIE SCOTT: Yes, my Lord.

Lord SUMNER: Before you read the provisions in detail may I put what has occurred to me and you will see when the position is before you whether there is anything in it or not. Apparently under the old Native system before 1893 the Natives' rights, whatever they were, were enjoyed through some tribal chief who was an integral part of the system. It was not as definite as trustee and *cestui que trust*, because there was no separate interest in any one member of the tribe, and then as it actually existed for a good many years before 1893, certainly before Lobengula's time, and apparently in the time of his father, it involved this further: That if there was a paramount chief the sovereign was an essential part of the system, and the rights of the tribe were enjoyed under the exercise of his sovereign powers.

Mr. LESLIE SCOTT: Yes.

Lord SUMNER: He vanishes, and there need be no appearance of legitimacy about it. There is no successor unless there be a successor by force of arms. Whatever the rights of the subordinate chiefs and their tribes may be, are they not essentially rights enjoyed, and are they not rights which were always in the old times subordinate to the sovereign right of the sovereign of the time, and, as we know, Lobengula did control them and parcelled out land. If so, when you find the Order in Council establishing the Crown as sovereign not as a conqueror who annexed, but as sovereign of the administration in the land and that sovereign declares his will by the Order in Council is not in effect that a substitution of the independent and original authority of the new sovereign for that form of

sovereign control which takes the place of Lobengula's control, and subject to which the Native rights, whatever they were, always had to be exercised? Would it not therefore have the legitimate effect of substitution for a vague Native law which more or less covered the whole territory the precise prescription of the ordinance which conveys the Native rights to have reserves allotted to them from time to time and the exercise of their tribal rights inside those reserves?

Mr. Leslie Scott: I submit not, for this reason. The suggestion your Lordship makes really involves mistaking legislative power over territory for ownership of land. Supposing another existing Native regime before the white man was there. The permanent king had been killed and he was in a certain sense trustee for his people, there being no Court of Chancery to appoint a new trustee. No doubt the Natives had some machinery by which there was continuity of tribal communal ownership. There was a regent, or whatever it may be, that came in and stepped into the trustee's shoes, so to speak, for that purpose. Whether in Native law applying to ownership of land where the native king disappears and a white king comes in, the Natives would regard the white king as stepping into the shoes of the native king or not I cannot say. That was one thing we wanted evidence about if we could have got it. I would submit respectfully, at most the white king would take the place of the native king as the joint owner with the tribe just in the same way that the paramount chief or native king was before, and to say there is a change in the private property because a white king comes in would be contrary to the general law which is applicable equally on cession of territory by peaceable means, and that conquest and the change of sovereignty does not change the private property of any of the individuals or tribes in the conquered territory.

Lord Atkinson: That leaves the question: Did this Order in Council give the Natives rights which they had not before?

Mr. Leslie Scott: I agree it does not touch that. I have not said a word about that.

Lord Atkinson: For instance, if they are to have a hut it entitles them to hold private property in land.

Mr. Leslie Scott: This is new legislation, and the Natives are bound by it.

Lord Atkinson: You say those are supplementary rights in substitution for others?

Mr. Leslie Scott: I am coming to that now. The first observation upon it is this: that there is no clause in this document which says in terms that the Native ownership by the various tribes is brought to an end. I have nothing more to say about that. In the absence of that I submit it would be contrary to all rules of interpretation and particularly to the rule that is the law of this country as well as the law of the United States, to, so to speak, try and collect out of this document an intention to take away the property when there are no express words to take it away. That is the real force of the argument here. It recites at the start that the British King is the protecting Power.

Lord Sumner: Her Majesty is the protecting Crown. Her Majesty's will is to leave all rights of private property unexpropriated. She does not exercise any conqueror's rights, but as protecting Power she intends to do what the sovereign Power in the old land could do, that is to say, as sovereign say: "Your tribal rights are to be exercised under me and subject

to my directions." In virtue of the sovereign Power subject to which Native rights had always been. Whatever they were Her Majesty is pleased to treat the Native rights unexpropriated should still be enjoyed, but now *sub modo* for the good of the people instead of its extending all over the country and thereby excluding the blessing of white civilization it should be exercised in separate Native reserves that are to be specially looked after and protected and when the blessings of white civilization could be enjoyed. What is there contrary to any civil interpretation in that?

Mr. LESLIE SCOTT: If I follow your Lordship aright, I do not know that I follow the whole of your Lordship's observation, the Order in Council might have said every word that your Lordship has said. There is nothing to prevent the British Crown legislating in the precise language your Lordship has used had it so chosen. My only submission is the legislation it did pass by this Order in Council was not the same as your Lordship has indicated, and that is a question of interpretation. That is the whole point.

Lord SUMNER: If you are right in assuming the Native rights after even the flight of Lobengula and the disappearance of his throne were strictly such rights as may be called private rights of protected property, then it may be that in order to interpret this Order in Council, if they do not amount to private rights in that sense, but are tribal rights, as to which the only thing that is quite clear is some power to exercise under the control of the paramount chief, their different constructions might be put upon the Order in Council.

Mr. LESLIE SCOTT: Let me say at once I stand or fall with the proposition that the Native rights were rights of property.

Lord SUMNER: Private property.

Mr. LESLIE SCOTT: Private rights of property.

Lord SUMNER: In as full a sense as the rights of the planters in Granada.

Mr. LESLIE SCOTT: Fuller, and substantially fuller; that is the difference between Canada, the two Floridas and Granada, when the King only left them a right of possession of a limited kind.

Earl LOREBURN: Supposing they only amount to a right of occupation and usage—that they were rights of a small kind.

Mr. LESLIE SCOTT: There is no reason they should not survive.

Earl LOREBURN: If they were rights of usage in land, can you get rid of those otherwise than by legislation or conquest?

Mr. LESLIE SCOTT: No, and that is my case.

INSECURITY AND INADEQUACY OF RESERVES.

Mr. LESLIE SCOTT: The natives of this country, Rhodesia, and I include Matabeleland and Mashonaland, were Natives who, on the evidence, have lived for generations, on my construction, in the same district, and loved their district as their home. My submission is that a court of law ought to regulate the Native ownership through his tribe, to the soil of the village or the district that is his home with exactly the same sacred respect that would be given to individual enjoyment of their homes by white men in the case of cession or conquest or sovereignty.

Lord ATKINSON: Does not Section 49 place the matter absolutely in

the hands of the Land Commission? "The Land Commission shall deal with all questions relating to the settlement of Natives on the lands in that part of the territories within the limits of this Order which is known as Matabeleland. It shall without delay assign to the Natives inhabiting Matabeleland land sufficient for their occupation, whether as tribes or portions of tribes, and suitable for their agricultural and pastoral requirements, including in all cases a fair and equitable proportion of springs or permanent water." In addition to that, they got what they had no right to before, and a right to a sufficient number of cattle.

Mr. LESLIE SCOTT: What is there necessarily inconsistent with its being the duty of the Land Commission to pay attention to Native title to the soil of different parts of the territory? My submission is that this is made in the view, as I put it yesterday, that there was a good deal of really unoccupied land, not beneficially occupied by and not effectively or justly claimed by any Native tribe, a vast territory and a comparatively sparse population.

Lord ATKINSON: Do you call that land suitable for their agricultural and pastoral requirements, including in all cases a fair and equitable proportion of springs?

Mr. LESLIE SCOTT: Some of it may be, my Lord. Why should not the Commission assign districts into which the white men were not to go; and that is the object of this Order in Council.

Lord ATKINSON: Nor apparently any Natives except the Natives to whom the reserve was assigned.

Mr. LESLIE SCOTT: I accept that. Why is not this consistent with leaving the Natives' title where there is a Native title standing?

Earl LOREBURN: Were it not for conquest your argument would be of very great weight in my mind, because as you have said perfectly accurately you do not dispossess people by legislation unless you make it clear, but supposing that it was an act of power substituting a new condition of things for the previous condition of things, are we to see whether that is not the true interpretation of what was done in this Order in Council?

Lord DUNEDIN: If you make out that as a matter of fact Lobengula never had any dominion over these people, that is quite true, but my remark referred to the people over whom he had dominion; Umtasa may have been one, and he certainly moved those people about.

Mr. LESLIE SCOTT: I do not think it would be right to assume that was so.

Lord DUNEDIN: That is told us to be so.

Mr. LESLIE SCOTT: Only to a very limited extent. There is evidence they lived for generations in the same places in and near Bulawayo, right up to the site of Lobengula's Government. I do want to emphasize this aspect of the matter, that it would be wrong to come to any legal conclusion based upon the assumption that these were nomadic Natives that moved about from place to place, and it did not matter if it was in one place or another, the evidence is they loved the places where they lived and were attached to them, because they lived there for generations. It would be wrong to assume authority on the part of the Crown to move them unless that was clearly expressed. There were a great many who had by the war been dispossessed and kraals burnt for one reason or the other, and this Order in Council was to find a suitable place for the people who were wandering.

Lord SCOTT DICKSON: Does not the Foreign Jurisdiction Act apply on the footing that there has not been a conquest? This Order proceeds by virtue and in exercise of the powers by the Foreign Jurisdiction Act of 1890. Does not that Act subsume that there has not been a conquest?

Mr. LESLIE SCOTT: That is my point; my point is that this Order in Council repudiates, so to speak, in almost expressed language the idea of its being in virtue of the conquerors' power.

Lord DUNEDIN: Speaking for myself, I do not see that; an Order under the Foreign Jurisdiction Act may be inconsistent with annexation, but I do not see that it is inconsistent with conquest.

Mr. LESLIE SCOTT: It is the continuance of the protectorate that is the point on which I rely, the protectorate which had been declared in 1891 and this Order in Council, not in the land part of it, but in the rest of it, was dealing with Mashonaland as well as Matabeleland, where there had been no war at all, and where the Mashonas had been attacked and protected by the white men

Lord ATKINSON: Is not it clear from the first recital that this Order is made in exercise of any powers that Her Majesty had?

Mr. LESLIE SCOTT: The first recital.

Lord ATKINSON: In exercise of the power granted by the Foreign Jurisdiction Act or otherwise?

Mr. LESLIE SCOTT: Yes, I drew attention to that. Lord Justice Farwell and Lord Justice Kennedy, in the Sekgome case, deal with that. Now would your Lordships first look at Section 52, on page 43 of B. I cited that first sentence just before the Court rose yesterday, but not the second: "No Natives shall be removed from any kraal or from any land assigned to them for occupation, except after full inquiry by, and by order of, the Land Commission. If any person without such order removes or attempts to remove any Native from any kraal or from any land, unless in execution of the process of a competent court, he shall in addition to any other proceedings to which he is liable, be guilty of an offence against this Order," and so on. Now that, my Lord, I submit, shows that the King in Council was recognizing the fact that the Natives were living on the land in kraals at the time, and it contemplates the ordinary rule.

Lord ATKINSON: Surely that has reference to Section 24 which says: "A native may acquire, hold, encumber, and dispose of land on the same conditions as a person who is not a native, but no contract for encumbering or alienating land the property of a native shall be valid unless the contract is made in the presence of a magistrate, is attested by him, and bears a certificate signed by him stating that the consideration for the contract is fair and reasonable, and that he has satisfied himself that the native understands the transaction." I suggest 52 applies both to reserves and the land the Native may acquire under 24.

Mr. LESLIE SCOTT: That is to say that no white man shall be allowed after buying a piece of land under Section 24 to turn out the Natives living on it without an order of the Land Commission.

Lord ATKINSON: Not only that, but the purchase must be approved of; it says the purchase or encumbrance must be approved of.

Mr. LESLIE SCOTT: Under Clause 24.

Lord ATKINSON: Yes.

Mr. LESLIE SCOTT: It may be that your Lordship is quite right.

Lord ATKINSON: It says: "But no contract for encumbering or alienating land the property of a Native shall be valid unless the contract is made in the presence of a magistrate, is attested by him, and bears a certificate signed by him stating that the consideration for the contract is fair and reasonable, and that he has satisfied himself that the Native understands the transaction." There is the connection between 24 and 49.

Mr. LESLIE SCOTT: If your Lordship pleases. I am not sure that I should respectfully accept that suggestion, as Counsel, that 52 ought to be read in connection with 24, which is in Part II, but if it is, it is in my favour.

Lord SUMNER: Surely; Clause 52 says: "If any person without such order removes or attempts to remove any Native from any kraal or from any land"; there is the kraal and the land, and the first words of section are "from any kraal or from any land assigned to them for occupation."

Mr. LESLIE SCOTT: I do not, respectfully, agree.

Lord SUMNER: It looks like it.

Mr. LESLIE SCOTT: I submit the land assigned is one thing and the kraal is a kraal, but not an assigned kraal.

Lord SUMNER: You say "assigned" does not apply to kraal?

Mr. LESLIE SCOTT: No; there was a vast number of Natives living in kraals.

Lord ATKINSON: Surely that is wrong, Clause 49 says the Land Commission shall without delay assign to the Natives what I suppose was set apart.

Mr. LESLIE SCOTT: But not for all the Natives.

Lord ATKINSON: No, for the tribe or part of a tribe, it shall be reserved or set apart for certain tribes or groups or portions of tribes.

Mr. LESLIE SCOTT: Well, my submission is it all comes down to this, that this Order in Council is consistent with an intention to leave the Natives who are already living in different parts of the land in ownership of the property where they are, and that there are no words sufficient to dispossess them.

Mr. LESLIE SCOTT: I want, if I may, to put a really alternative suggestion before your Lordships, and that is this, that you cannot arrive at the interpretation suggested against me that this does amount to legislation which expropriates the Native title, the compensation for which is to be the reserves, unless the reserves given by way of compensation are to be given to the Natives as their permanent property.

Lord ATKINSON: It comes down in a word to this, that these rights are supplemental to their ancient rights, and not in substitution for them in whole or in part.

Mr. LESLIE SCOTT: That is the main argument. These are supplementary for good order. The alternative view is to say that that view is wrong, as a matter of fair interpretation, and at the same time say that their tenure of the land within the reserves is obviously precarious, that the reserves are as the Chartered Company contend, their commercial

property, and that they can be cut down from time to time. I submit that that interpretation would be a wrong one, and there is a point upon that, and one or two documents have a bearing upon it. Section 51 says: "The Company shall retain the mineral rights in all land assigned to Natives." Does not that inferentially mean that except for the mineral rights the land is to belong to the Natives, and the Company are only to retain the mineral rights?

Lord ATKINSON: That is an introduction to the next part: "If the Company should require any such land for the purposes of developing minerals," it gives them land equivalent.

Mr. LESLIE SCOTT: That is the corollary of it. I submit the alternative view in this case must be either all this land legislation is supplementary to the ordinary rights of the Natives, or it is expropriation, the compensation for which is the complete ownership of the reserves and the final ownership of the reserves, subject only to the retention of the mineral rights, with the rights for the purpose of developing mineral rights, of expropriating the particular piece of surface, compensation to be in land equivalent elsewhere, and subject to the right of eminent domain, to compulsory purchase of the surface of the reserves for public purposes.

Earl LOREBURN: Your general proposition, in support of which you are arguing, is this: That when the Order in Council was made it was not an act of conquest or done pursuant to conquest; it was a constitutional act pursuant to the pre-existing constitutional relations. Now, quite tentatively, for my own part alone, I think the only way in which it can be pressed against you is to say that this was, in point of fact, a new settlement made consequent upon the rights acquired by conquest in lieu of the pre-existing conditions hinging wholly upon the point of conquest. If it was not substitution of the one regime for the other regime, I find a difficulty in saying that there is an expressed intention of dispossession. That is the point of view which for myself you will have to meet, whether this was not really the realization of the fruits of conquest. I know you dispute the question, and then that observation would tumble to the ground at once if you established your point. That is my own personal view.

Mr. LESLIE SCOTT: Now my general submission on those two Orders in Council is that there is not enough in the language used to warrant the interpretation that the Natives were intended thereby to be expropriated. I just refer to the alternative, because it is a mere alternative, that if the alternative view were taken that there was an intention to expropriate, it could only be upon finding in the language of the documents an intention finally and completely to give to the Natives the land and the reserves, and not to let the Chartered Company claim that as their commercial asset.

Earl LOREBURN: What do you ask us to say as the conclusion of your argument? Is it that there should be a declaration that there is no power to interfere with the Native rights, whatever they were, which I have also thought it unnecessary to go into in detail, or that it is a power upon compensation in general terms, or that it is a power upon making permanent and unalienable the reserves? What is the conclusion? That is a matter of policy, I know, but I want to know what your argument leads to in law.

Mr. LESLIE SCOTT: I submit that at the date of the Resolutions, April 1914, there had been nothing done by the British Crown or by the British South Africa Company validly to divest the Natives of such title

as they had. The corollary of that would be that the matter would have to be dealt with, and history cannot be unwritten, but no doubt as a matter of policy the Government would take into account what had been done right down to 1917, and on the basis of that decision they would consider what was the right thing to do.

Earl LOREBURN: In other words that it should be declared or expressed in the reason for the answer that that is the true state of the title, whatever rights existed, and thereupon His Majesty would recommend his subjects to govern themselves accordingly.

Mr. LESLIE SCOTT: Quite. I want to make it perfectly clear on the question of policy that I admit on behalf of the Natives the complete legislative power of the British Crown hereafter to pass such legislation affecting the lands of the Natives as is right, and as the Crown may in the exercise of their constitutional rights and discretion think fit.

Earl LOREBURN: That the basis of treatment should be that you have not been deprived.

Mr. LESLIE SCOTT: That the basis of treatment should be that we have not been deprived; that the problem of policy is approached on that basis.

CONCLUSIONS.

Mr. LESLIE SCOTT: My Lords, the material points that I want to put before your Lordships come under these heads: (1) What is involved in the maintenance by the British Crown of the status of protectorate. (2) Does the conquest of the Matabele affect that position or modify it? and finally, What is the true principle to apply to ascertain how that answers the question: did the Crown assume the ownership of the private property in land so as to divest the private owners? These are, shortly, the heads. Now, the view that I tried to put before your Lordships before on the question of protectorate has been in the course of argument, I think, practically speaking, adopted, without any decision, of course, from your Lordships, by your Lordships. I conceded that in an African protectorate it was quite impossible to look at any juridical definition of what it was, to ascertain its precise limits or its precise scope. I conceded that for the purpose of administration, for the purpose of government in that sense, of preserving law and order, and of passing legislation within the territory, an African protectorate must be taken as giving to the Crown complete jurisdiction. I do not dispute that. But that in my submission leaves open the fundamental question which is this, the ordinary principle of law as recognized in our Courts being that when sovereignty over territory is assumed, the private property of the subjects of the previous state within that territory will be left intact, that being the ordinary principle, even in cases of conquest it is essential on the Crown to say that its right as conqueror to take the private property of the subjects of the conquered State has been, if I may use the expression, overtly exercised by some act which is unequivocal in its character.

Now, my Lords, I venture to submit that last submission is the submission which most vitally affects both this case, and, if I may say so, the administration of justice in the matter of constitutional law throughout Africa, where our domains in the wider sense, including protectorates, are concerned. I venture to submit that it goes to the root of good government

throughout Africa, to the root of the belief by the Native races in the justice of the British Government, the principle that privately owned land will be respected just as much when the owner is a native and just as much when it is a native tribe and when it is a white man. That is the constitutional view which is involved, and my respectful submission to your Lordships is that that is a fundamentally legal principle which goes to the root of this reference.

Now, as to the question of the scope of protectorate, I want to give your Lordships two references in that volume of essays by Professor Westlake to which I have already referred. The pages begin on page 181. I am not going to read it, it is a few pages, but my submission is that the gist of it is on page 185. At the bottom of the page there is this sentence: "But when the exclusive character of a protectorate is admitted, surely it follows that the government required by the conditions of the region must be supplied by the State which excludes all others from supplying it, and that that State is armed by all others which recognize its protectorate with their consent to its exercise of jurisdiction, indispensable for the purpose, over their subjects within the recognized area." Then he deals with the aborigines.

Now the Attorney General was faced by your Lordships several times with the questions when and how do you say that the Crown assumed ownership, and my submission is that his answer was logically fallacious. His answer is at page 435 to page 439 of the transcript.

Lord DUNEDIN: Four pages of fallacy.

Mr. LESLIE SCOTT: Four pages based on one fallacy. The fallacy was this, as I submit, that he confused territory over which sovereignty extends with land in which there is property. No doubt the assumption of Government carries with it the right of what is called eminent domain, the right of passing legislation to expropriate private property with or without compensation, admittedly the legislation may, of course, be by Order in Council. That I concede. I also concede that in the case of a conquest the conqueror has the right which is in the legal sense an option, a right of election, to do two things, as Lord Mansfield said, one, to kill the people, two, to take their lands, but I submit that you may no more infer when the right of election has been exercised by the conquering king to take the lands of the people unless he makes that plain by an act of state of some sort, than it would be to infer that he had killed the people when he had not killed them. The fallacy in the argument here which underlies in my submission the greater part of the whole discussion in this case as to whether the Crown had the ownership or gave the ownership to the Company, is the confusion between territory and land, sovereignty and power. It was for that reason that I before referred your Lordships to that short passage in Professor Westlake's volume of papers. In chapter 9 at page 131, at the bottom he said: "But property and sovereignty play widely different parts in the system of acts and purposes which makes up civilized life, and sometimes they are contrasted with one another in circumstances which would make it very inconvenient to say that a State has the property in its territory. For instance, when a State cedes a province it cedes the territorial sovereignty over the whole, and the property in those parts which belonged to it as property, such as fortresses and public buildings, but the property in all other parts remains unaffected. If the State which receives the cession desires to erect a new fortress or enlarge an old one, it must acquire the necessary site from the proprietors by purchase or expropriation according to law. The power of expropriation for

public purposes is one of those powers of the State subject to which all property is enjoyed, and which are collectively described as eminent domain, and in this another reason has been found for treating territorial sovereignty as a kind of property." Then, at the bottom of the page, he says: "The right of eminent domain as it exists within a State rather limits, and when exercised affects, property, than is a reserved portion of it; but the cession of territory, as we have seen, does not affect any property except what is included in the cession because it happens to belong to the State and is therefore alienated in the excercise of the ordinary rights of property." And then over the page, in the middle of the page he says: "On every ground then I shall treat territorial sovereignty as distinct from property, and shall avoid describing it as eminent domain." There is a similar passage in his book, "International Law," page 5, intitled "The Title to State Territory," which I need not read to your Lordships. It is at pages 85 to 89. Now upon that supposition I base the following further comment and that is this: that the Law Officers of the Crown have been unable to point to any single act of state, that is to say any definite official act or document at the critical period which in clear terms manifested the intention of the State to take the property of any of its newly acquired conquered subjects. My submission is that on the contrary it is quite clear that the Crown never addressed, so to speak, its mind to this question.

Lord SUMNER: If the Crown was aware of the possibility of a claim for such Native rights as you are asserting, could it more explicitly sweep them away and make an end of them than by the stipulation in the agreement and these provisions in the Order in Council which state: henceforward the Natives shall have a part only of these territories assigned to them by the British South Africa Company with a suitable amount of cattle and with a Land Commission and a Judge and so forth to look after them in any assignments? Your view is that they possessed those rights, very probably in the whole of the country, certainly in parts of the country which are very different from those which were to be assigned under the Order in Council, and if the Crown expressly announces a new system which is totally inconsistent with the picture you have drawn of the old one, is not that a very explicit intimation that it intends to take away the old property and give something else in lieu of it, adequate or not, I am sure I do not know?

Mr. LESLIE SCOTT: I submit that what the Crown did by the Order in Council of 1894 or had previously started to do by the agreement of that year is not so radically inconsistent with the maintenance of the native title, or conversely does not so necessarily involve an intention to sweep away the native title that it would be right to so construe it and the position of the Lippert Concession as indicated in the question of Lord Dunedin is very relevant to this aspect of the case in my submission. We cannot forget the history of the Lippert Concession. The Lippert Concession has been approved by the Crown at an earlier stage and called a settlement of the land question before the war. That was the phrase, almost in those words, and if the Crown was thinking in 1894 that under the Lippert Concession the Company had got some rights without addressing its mind to a definition of those rights and ascertainment as to what they were in their scope and effect, is not that a very natural explanation of the fact that no settlement of this question was arrived at or made by the Government of this land question?

Lord ATKINSON: How could there be a more explicit assertion of the expression of the sovereign will than that the old communal rights should be discontinued and giving authority to one agent to grant the land and enjoining the sole agent to make special reserves.

Mr. LESLIE SCOTT: With great submission there is no grant to the agent.

Lord ATKINSON: Grant and authority.

Mr. LESLIE SCOTT: There is no bestowal of authority upon the Company in this agreement to assign land away. It is true that lands have been assigned away by the Company. I venture to submit there is no express bestowal of authority upon the Company in this agreement.

Earl LOREBURN: I do not know, not as regards the Natives; but look at it as regards the Natives, and that is the proposition you are seeking to advance, that Clause 27 says a Land Commission having been created in order to deal with all questions as to native settlements: "The Land Commission shall as regards the portion of the said territories termed Matabeleland assign to the Natives now inhabiting the said portion land sufficient and suitable for their agricultural and grazing requirements and cattle sufficient for their needs." You say that they already were entitled to it. I quite agree you need not trouble about the nature and details of the occupation, they had certain rights which at all events entitled them to land. Here is Clause 27, which is a perfectly superfluous clause, if the Crown did nothing to interfere with their rights. The Land Commission is created to assign to you certain land sufficient for your requirements. Is not that inconsistent with the maintenance of the right, whatever it may be, that you put forward?

Mr. LESLIE SCOTT: I venture to submit not either perfectly superfluous or necessarily inconsistent with the rights for these reasons: not perfectly superfluous because the war had resulted in the disturbance of the whole population of this part of the country.

Lord ATKINSON: I think you said before that the position of the Natives was that they had the rights they got under 1894 plus their old rights.

Mr. LESLIE SCOTT: My submission is that of the two interpretations of this agreement to say it meant that they were given, so to speak, additional rights by way of making their position certain, is an interpretation more consistent with justice, and, therefore, a better legal interpretation than to say the whole of their existing rights were taken away in exchange for fixing the reserves which might or might not be reserved for them.

Lord ATKINSON: They got what they never got before, they got a right to hold.

Earl LOREBURN: There were the old rights, whatever they were, of the Natives. Then two things followed under the agreement, the agreement following upon the previous history; the first is that the Company is authorized either on its own account, or on account of the Company, whichever you like, I do not care for this purpose, to settle whites on the land, which was yours before, and secondly, there is to be a special reservation sufficient for your wants. Putting these two together, does not that mean the supersession of the old tribal rights? They had a right to hold too.

Mr. LESLIE SCOTT: My submission is the right of the Government to expropriate land within its territory belonging to individuals is a right which would meet the occasion of that particular need at any time, and that from that fact one has no right to infer an Act of State depriving the whole of the Natives of their lands, whether expropriation for public purposes or mineral development was necessary or not. That is just the whole

point. I concede to the full the Government's right to expropriate any lands belonging to any Native tribe within the area of Rhodesia, on the ordinary principle of eminent domain.

Earl LOREBURN: Think what that admission goes to, it goes to this that though you sell the domain or property in land, or whatever you like to call it, your statement now means that the Crown did take, or did acquire by conquest the right of dispossessing any Native subject of his own control for the benefit of the Natives and so forth, for the purpose of facilitating settlement. Perhaps you may desire to reconsider whether you should put it in that way, but that is really nothing else but what the Crown asks.

Mr. LESLIE SCOTT: I venture to say it is radically different from what I understand the Crown to ask.

Earl LOREBURN: I think it is accurate.

Mr. LESLIE SCOTT: I think that is the true position, but I do want to make it clear to your Lordships in what way I distinguish that position from the position which the Crown or the Company seek to take up, it is on that distinction, and on that distinction only, that my submission in this case really turns. That right attaches to every right of sovereignty to every government. Every government, as I read that passage from Professor Westlake's book, must have the right, as an incident of the power to govern, of expropriating public lands for public purposes. We do it under the Lands Clauses Act in our civilized country; it is inherent in government; it is the power that was expressly reserved in the Order in Council of 1894, Article 51, which is in Appendix B, at page 43: "The Company shall retain the mineral rights in all land assigned to Natives. If the Company should require any such land for the purpose of mineral development or as sites for townships or for railways or for other public works, the Land Commission, upon application by the Company and upon good and sufficient cause shown, may order the Natives to remove from such land or any portion thereof."

Lord ATKINSON: That is reserve.

Mr. LESLIE SCOTT: It is perfectly true that is the reserve, but that is an illustration of the ordinary power to compel purchase or expropriation which are necessarily in my submission involved in any theory of government.

Lord ATKINSON: It is common sense that if they have a reserve and part of it was taken away, they should have additional land.

Mr. LESLIE SCOTT: True, that is an illustration.

Earl LOREBURN: Does this represent what you are really driving at, the desire that there should be a liberal compensation in land elsewhere wherever the Natives who occupied were turned out? Is that the point you are driving at?

Mr. LESLIE SCOTT: No, that is a question of policy.

Earl LOREBURN: I know. The point you were arguing was that this Order in Council and the agreement which is the foundation of the Order in Council was not an unequivocal exercise of the right to possess the Crown of the land.

Mr. LESLIE SCOTT: I was.

Earl LOREBURN: That is the proposition. In regard to that proposi-

tion you say the land has to be assigned, and if that land is taken away other land is to be given in exchange. There are provisions made for the rest of the land. I can understand your saying perfectly that in regard to all land that is in occupation that the Crown ought to do the same: it would not be a legal argument but another kind of argument altogether, but I do not see where you find that this supports your contention that the Crown was not exercising jurisdiction.

Mr. Leslie Scott: I think it is very important to distinguish between the two methods, the two roads by which the Crown may acquire title in the land. The first one that is suggested is that on the acquisition of territory, whether by conquest or cession is immaterial for this purpose, the Crown may acquire the ownership of the land just because it acquires the sovereignty of the territory. Now that is a fallacious argument, in my submission. Then it is said: True, it cannot give the private property in the land merely by giving the sovereignty over the territory, but as a conqueror it has the right to take the private property when it assumes sovereignty over the territory, and in regard to that I do not dispute that it has the right of election.

Earl Loreburn: It did not exercise it?

Mr. Leslie Scott: It did not exercise it.

Earl Loreburn: It did not do it in the way you say it should?

Mr. Leslie Scott: No.

Earl Loreburn: What was done, and what was not done, being the two things, you have to take them both?

Mr. Leslie Scott: Quite; then I say I admit there is the legislative right of expropriation inherent in all Governments, but in my submission the legislation passed by the Crown, namely, the Order in Council of 1894, did not, in fact, expropriate the whole of the Native title, and my submission is that, as a matter of interpretation only, and that considered as a matter of interpretation, that is the right interpretation, because of the general principle that you must not assume expropriation of private property by any legislative words unless the language is absolutely clear.

Earl Loreburn: You say the language must be definite, or the acts, or both together, must create a definite exercise of the power, and you say there was not that.

Mr. Leslie Scott: Precisely. The result of it was that the problem was really never directly faced; it may be because there were erroneous assumptions or that they had not really appreciated what the position was; it may be this, that they had not really appreciated themselves the question as to what the Native title was; one cannot say, but my submission is that whatever the reason, they in fact did not either by act of State in exercise of the right of sovereignty take the vacant land, nor did they in exercise of the administration that gave them power, pass legislation to expropriate it.

Now, my Lords, I want to add a further word on this aspect of the matter. Supposing that the argument was wrong and that my submission was found unacceptable to your Lordships in the result, and that in exercise of the right of conquest the Crown must be taken by the agreement and Order in Council of 1894 to have intended to take from the Natives of Matabeleland their land, the Mashonas in the war of 1893 remained loyal

to the Crown, I say to the Crown advisedly, because for practical purposes although it was a protectorate the British Crown through the Company was the sole Government of Mashonaland ; the Natives remained absolutely loyal in Mashonaland : the Matabeles attacked them, the Company defended them, and in the result the Matabele were defeated. As conquerors of the Matabele, is the Crown to say they will reward the loyalty of the Mashonas by taking the private property in land, even although both the agreement and the Order in Council of 1894 are expressly limited to that portion of the territory called Matabeleland and exclude Mashonaland ?

Earl LOREBURN : I notice that with regard to this there was another Order in Council afterwards, in 1898.

Mr. LESLIE SCOTT : Four years later ; that is at page 45 of Appendix B. The fact that there was an Order in Council in 1898 affecting Mashonaland must be quite irrelevant to the conquest argument, I submit.

Lord ATKINSON : Was not there a rebellion between 1894 and 1898 ?

Mr. LESLIE SCOTT : There was a rebellion in 1896.

Lord ATKINSON : When it was suppressed, were not the Mashona people suppressed and defeated ?

Mr. LESLIE SCOTT : To what extent the Mashonas took part I do not know.

Lord ATKINSON : It was a more serious form ; it cost millions.

Mr. LESLIE SCOTT : There was a rising then. If your Lordships say the 1898 Order in Council must be treated as an act of the conqueror upon the conquest of the Mashonas in 1896, then it is the same point as the other.

Earl LOREBURN : Exactly. If Mashonaland was not to be treated as having been conquered in 1893–94, then it may be if they were not conquered, then it may be they were conquered in 1898 or 1896 or before the 1898 Order in Council.

Mr. LESLIE SCOTT : My submission upon that is this : that really both Orders in Council are in their character obviously legislative, and neither of them acts of State by the conquering Power purporting in right of conquest to confiscate the land of the conquered. If you look at them you appreciate that that is the position, and my submission is that the continuation of the Protectorate from 1891 right throughout this time has a very important bearing on that, and that is the only importance of the continuance of the Protectorate, that it is an important element to take into account in considering whether the intention of the Crown must be taken to have been to confiscate the land or not ; that is confiscation as distinguished from legislative expropriation.

Mr. LESLIE SCOTT : May I make my submission about both these wars in 1893 and 1896 ? They were regarded by the Crown in each case as civil disturbances of a serious character of course, but civil disturbances within a territory over which the Crown was exercising effective jurisdiction.

Lord SUMNER : Why do you say civil disturbances, because the forces were called policemen ?

Mr. LESLIE SCOTT : No, my Lord, because the Crown was not treating them as wars between this country and foreign Powers. That is the distinction I was trying to make by saying " civil." They regarded them as disturbances of law and order, but not as creating, so to speak, a disturbance

in the conventional relations between the Crown and the Native peoples in those territories. One wants to get at the relation of this case, because it is so easy, as I submit, to draw an inference based upon the use of a word like conquest when the reality of the case was that the Crown was not acquiring, in any sense, the rights of a conqueror, but were continuing an administration which had been interrupted by serious disorder.

Lord SCOTT DICKSON: They treated it as a rebellion.

Mr. LESLIE SCOTT: Precisely; that is the way it was treated.

Earl LOREBURN: If that be so, then it was a protectorate in which a rebellion occurred and in which the Crown, as protecting Power, then exercised its right, or claimed to exercise its right if it did—I know you say it did not—of taking possession of the Native land. I should have thought, in cases of this kind, that if they thought fit to do it, and if they did it, they might derive a title from their position as protecting Power where a rebellion had taken place, just as much as if it had been what you call a conquest.

Mr. LESLIE SCOTT: That is a very difficult question to answer. They might derive title; that question, of course, means, would it be consistent with recognized principles of law that under such circumstances the Crown should derive title.

Earl LOREBURN: I thought you said you recognized their right to do so.

Mr. LESLIE SCOTT: I recognize the general right of conquest as giving to the conqueror the right to acquire title by taking it.

Lord ATKINSON: Surely there was a conquest, for the reigning sovereign was beaten in the field and ran away and disappeared.

Mr. LESLIE SCOTT: Supposing there was a conquest with regard to Matabeleland, certainly there was no conquest in 1896, it was a rebellion.

Lord ATKINSON: I am not sure of that. Mashonaland was part of the sovereign's territory.

Mr. LESLIE SCOTT: Your Lordship will remember the letters in which it was said after the defeat of Lobengula all semblance of Native power or government had passed away. What happened in 1896 was a mere rebellion. Your Lordship appreciates what I am submitting.

Lord SUMNER: After rebellions there have been considerable amounts of annexations or expropriations or appropriations historically.

Mr. LESLIE SCOTT: Yes, that is quite true, but this is a legal reference as to whether there is a legal principle upon which it can be said the title of the Natives passed from them.

Lord ATKINSON: Surely you cannot contend that if a Native sovereign rules over a certain district and has resort to arms, and makes war, and is beaten, the district in which he did not make the war is not fallen, but only the district in which he did make the war; his whole realm has fallen.

Mr. LESLIE SCOTT: I agree if the sovereignty of Lobengula extended over Mashonaland in 1893. My point is that, at any rate as far as Mashonaland was concerned, it is perfectly clear from the documents of 1894 that the Crown did not then purport to exercise any right of sovereignty in right of conquest to take the property of the Natives of Mashonaland,

because the agreement and the Order in Council of 1894 are limited in terms to Matabeleland. I want to make a further submission that the Crown were not purporting to act as conquerors even with regard to Matabeleland. All they did was in continuance of their powers under the Protectorate, and the Foreign Jurisdiction Act, to pass an Order in Council, the terms of which had been agreed beforehand between them and the Company as the governing power.

Lord SUMNER: It is not merely the fact that the Crown under the Order in Council sanctioned a carefully considered scheme for giving the Natives something different from all of their former rights, but the Crown throughout has been aware of and has apparently tacitly sanctioned the allotment of land in full title to white men without a moment's consideration for any pre-existing supposed Native rights at all. The whole conduct ever since 1895 has been absolutely to ignore the system of rights which you assert except in so far as the system of Native reserves was concerned, and the encouragement of Natives on those reserves has taken its place. Whether it was done justly or unjustly, whether it was done after mature deliberation or none, whether it was done with knowledge of your clients' rights or in ignorance of them, or in disbelief of them, it has been done; for 25 years the plenary ownership tribally of nearly all the surface of Matabeleland and Mashonaland has been a thing that has apparently not even been raised in the minds of some anthropologist.

Mr. LESLIE SCOTT: Your Lordship's words will, of course, necessarily be heard in South Africa.

Lord SUMNER: I should think it is most unlikely.

Mr. LESLIE SCOTT: I fancy, my Lord, that this case will be watched by a vast number of African Natives within our jurisdiction.

Lord SUMNER: Then I will unsay all that. God forbid that I should shake the fabric of the British Empire by any observation that I make in the Privy Council. The point is this, however strong the language may be, the question is whether the Crown has a *jure caronæ* whether as conqueror or predominant protecting power, or what you treat as having suppressed a rebellion, whether it has done something quite inconsistent with their having any longer maintained or recognised a system of rights for which you contend.

Mr. LESLIE SCOTT: The answer is this. I do not think that the other parties to this case can produce before your Lordships cases in the rest of Africa where the Crown has dealt with Native title by way of confiscation to that extent. I have looked at a number of cases, and I believe in every other case of every other Protectorate, including Uganda, the Native title to land has been recognized to a very much greater extent than it would be supposing that view were adopted by your Lordships in Southern Rhodesia.

Earl LOREBURN: What we are here after is applying law as far as the term law is applicable to constitutional institutions and other situations of this kind; we are trying to answer the questions put. Your legal contention you have made perfectly clear, and it is that there is no such thing as title by conquest, because that imputed the overt act or acts, and that what was done was, to say the least of it, consistent with the maintenance of whatever occupation rights existed, the particulars of which I agree cannot matter, because only a small right is as good as a big right for the purposes of this discussion. That is really what it comes to. I think you

have told us your view about it, but you may have something more to say about it.

Mr. LESLIE SCOTT: That is precisely the position I take up, that the only materiality of the extent of the Natives' right is I suppose this, that if it had been recognized as an individual right of fee simple, your Lordships would struggle very hard against putting the interpretation upon the agreement and the Order in Council of 1894 which is contended for by the Crown or the Company as the case may be, and my submission is that when you get rid of the Lippert Concession as a true foundation of title, you are left with the Natives in complete enjoyment of the whole of the unoccupied territory.

Earl LOREBURN: Do you mean they were the only people; that they and their Sovereign between them, or they through their Sovereign, were the only people who had ancient rights to the territory?

Mr. LESLIE SCOTT: That is only on the question of degree.

Lord DUNEDIN: You have stood up for them very manfully, and the throne is vacant.

Mr. LESLIE SCOTT: I merely ask your Lordships to say in spite of the vacant throne, the subjects of that throne may still be allowed to remain in the occupation of their land subject to legislation.

Earl LOREBURN: I think we completely understand the way you put it.

Mr. LESLIE SCOTT: Then I have only two points which are very short to make to your Lordships. The Natives at the present time, as I told your Lordships, are living in large numbers on the unalienated land, something like 100,000 of them, and they are paying rent for that land. That brings the question to a point. Is there any justification for not merely taking their land from them to the extent of allowing the Company to assign it away, but also for making them pay rent before it has been assigned away?

Earl LOREBURN: Is that for land communally occupied, that they pay rent?

Mr. LESLIE SCOTT: Yes.

Earl LOREBURN: It is something outside the reserves?

Mr. LESLIE SCOTT: Will your Lordships look at Section 61 of the Extracts of Evidence from the Report of the Native Affairs Committee of Inquiry for 1910–11, which I handed to your Lordships. There your Lordships will see that Section 60 "Natives occupy land under the following class of tenure: (a) Communal, in reserves; (b) Communal, on land belonging to the British South Africa Company, described generally as unalienated land; (c) on private farms as rent-paying tenants; and (d) on private farms under labour agreements." Then Section 61 says: "Those in (a) pay no rent. All adult able-bodied males on (b) have to pay £1 per annum rent, which goes to the commercial side of the British South Africa Company. The Natives living on such land have very few restrictions imposed upon them; the cutting of timber is prohibited, except for building and domestic purposes. Those occupying (c) pay rent of from 10s. to 40s. per male adult."

Lord SUMNER: Is your point that there is no justification for the claim of rent?

Mr. LESLIE SCOTT: Entirely, my Lord.

Lord SUMNER: How does that arise on this reference?

Mr. LESLIE SCOTT: It does not arise directly. My submission is that to read into the Order in Council of 1894 an intention to take the land from the Natives, that they have owned, and to give the Company the right of charging them rent, is to do violence to the natural meaning of that document.

My Lords, I submit that nothing has been done by the Crown here since 1894 to take away the Native title, and that the case should be decided as if your Lordships were considering it immediately after 1894 or 1898, whichever it may be, and that no passage of time since then can affect the position. The very reason your Lordships are asked to advise the king upon the matter is that it is desirable in the interests of good government in Rhodesia that the legal position should be ascertained. If your Lordships should uphold the view that I have submitted, that the Natives have not had the ownership taken from them of the lands, where they have lived for generations, but that the assignment of reserves was merely an additional precaution in their favour, for their protection, then it will be open to the king in Council governing the Protectorate to pass such legislation in the future as may be fair to all concerned. When matters of policy are involved and considered, of course, the progress since 1894 will be material, and it will be open to the king, then, to do whatever may be fair, having regard to the existing state of affairs, but the first step towards a satisfactory settlement of the political problem, the problem of good government as between the whites and the Natives of Rhodesia, is to ascertain how far the Native rights were taken away, if I may use the expression, *per incuriam*, as it were, through language used in 1894, not designedly and expressly used, in order to deal with that problem. My submission is, in the absence of language carefully chosen and directly addressed to that problem of the Natives' title, as a matter of law it would be wrong to infer, from any documents which then came into existence, an intention to take from the Natives property that they had owned, and continued to own, up to that time.

The Anti-Slavery & Aborigines Protection Society

exists to maintain Justice for Native Races.

The Committee cordially invites all those to whom the maintenance of justice for weaker races of the World appeals as a duty to become Members of the Society.

A Subscription of half-a-guinea and upwards constitutes Membership of the Society, and entitles members to all literature issued.

Forms of Membership and Bankers' Orders can be obtained from the Secretary of the Society,

50-52 Denison House,
Vauxhall Bridge Road, S.W.1.

Butler & Tanner Frome and London